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Jun 17 1988		Order extending time to file response to petition until July 25, 1988.
Jul 25 1988		Brief of respondent United States in opposition filed.
Jul 27 1988		DISTRIBUTED. September 26, 1988
Jul 30 1988		Reply brief of petitioners Mark Fortney, et al. filed.
Sep 30 1988		REDISTRIBUTED. October 7, 1988
Oct 5 1988		Supplemental brief of petitioner Mark Fortney filed.
Oct 11 1988		Petition GRANTED. Judgment VACATED and case REMANDED for further consideration in light of Berkowitz v. United States, 486 U.S. ------ (1988). Dissenting opinion by Justice Scalia with whom The Chief Justice, Justice O'Connor and Justice Kennedy join. (Detached opinion.)

****

PETITION FOR WRIT OF CERTIORARI

87-1929

NO. _____

Supreme Court, U.S.
FILED
MAY 23 1988
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CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

MARK LYNN FORTNEY;
ESLEY DOUGLAS TIPTON
AND MARY E. TIPTON;
DANIEL WEBSTER HARMON AND
MARY JANE HARMON

Petitioners,

V.

UNITED STATES OF AMERICA

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED FOR REVIEW

Does the discretionary function exception to the Federal Tort Claims Act bar a suit turning on violation of mandatory military safety regulations?

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Fourth Circuit is unpublished and appears in the Appendix at 1A. The initial opinion of the United States District Court for the Western District of Virginia is published at 659 F.Supp. 127 (W.D. Va. 1987) and appears in the Appendix at 7A; the district court's opinion on motion for reconsideration is unpublished and appears in the Appendix at 16A.

STATEMENT OF JURISDICTION

The judgment and opinion of the court of appeals were entered on February 22, 1988. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. §1254(1).

STATUTES AND REGULATIONS INVOLVED

28 U.S.C. §1346(b) provides:

> §1346 United States as defendant
>
> Subject to the provisions of chapter 171 of this title, the district courts, together with the United States District Court for the District of the Canal Zone and the District Court of the Virgin Islands, shall have exclusive jurisdiction of civil actions on claims against the United States, for money damages, accruing on and after January 1, 1945, for injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the Government while acting within the scope of his office

or employment, under circumstances where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred.

28 U.S.C. §2674 provides:

§2674 Liability of United States

The United States shall be liable, respecting the provisions of this title relating to tort claims, in the same manner and to the same extent as a private individual under like circumstances, but shall not be liable for interest prior to judgment or for punitive damages. If, however, in any case wherein death was caused, the law of the place where the act or omission complained of occurred provides, or has been construed to provide, for damages only punitive in nature, the United States shall be liable for actual or compensatory damages measured by the pecuniary injuries resulting from such death to the persons respectively, for whose benefit the action was brought, in lieu thereof.

28 U.S.C. §2680(a) provides:

§2680 Exceptions

The provisions of this chapter and section 1346(b) of this title shall not apply to-

(a) Any claim based upon an act or omission of an employee of

the Government, exercising due care, in the execution of a statute or regulation, whether or not such statute or regulation be valid, or based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

AMCR 385-100 §1.3 provides:

Application

a. The mandatory requirements and advisory provisions set forth in this regulation apply to each activity and facility where the Commanding General, AMC is charged with the responsibility for safety.

b. Mandatory requirements are those in which the terms "shall", "will" or "must" are used, and no deviation is permitted without specific written authority in the form of a waiver, exemption or authorization from the Commanding General, AMC, Attn: Safety Office. The advisory provisions are those in which "may" or "should" are used, and no deviations are permitted unless exceptions (local waivers) are authorized in writing by the commanding officer or his designated agent. Local waivers covering conditions

which can be corrected should be granted for definite periods of time (one year or less). Such waivers must be reviewed at least annually to determine whether changed conditions warrant continuation of the waiver. All exemptions, waivers and authorized deviations shall be maintained in a central register which is readily available to authorized personnel.

c. Existing facilities not complying with safety regulations published after their construction or installation may be exempted from the new requirements when such action is authorized by the Commanding General, AMC. However, modifications, unless minor in nature and not decreasing safety, must comply with the latest safety requirements. AMC establishments with facilities exempted from compliance with regulations should take additional precautions to counterbalance the deficiencies.

AMCR 385-100 §20.4 provides:

> §20.4 Containers
>
> Hazardous materials in bulk or liquid form must be transported in containers which will prevent leakage. Containers used in intraplant transportation and service storage of explosives and explosive mixtures such as initiating explosives, pyrotechnic compositions and tracer materials should be made of material in the following preference order:
>
> Conductive rubber

> Nonferrous metal-lined boxes without seams or rivet heads under which explosive dust can accumulate
>
> Plastics (conductive-type only)
>
> Paper-lined wood boxes
>
> Fiber containers
>
> Fiber containers should not be used when they show signs of damage or wear. Glass containers should not be used because of their fragility and severe missile hazard.

AMCR 385-100 §12.33(g) provides:

> Certain hazardous operations such as nitrocellulose dehydration should be protected with a deluge capable of supplying water on the hazard within 50 milliseconds after ignition. Pipe lengths between deluge valves and outlets, and distance between outlets and the protected areas should be kept short to speed application of water.

STATEMENT OF THE CASE

The Radford Army Ammunition Plant (RAAP) at Radford, Virginia, is one of several facilities known as "government-owned, contractor-operated" plants, or GOCOs. Under this arrangement, the Government hires a contractor to operate a facility. At Radford, Hercules, Inc. operates the plant as the contractor; the Government owns the land,

buildings, equipment, etc. Hercules operates RAAP under a contract which is periodically renegotiated and modified.

Among the primary products manufactured at Radford are propellants for use in various explosives. An important constituent of the propellants is nitrocellulose. To be useful in these products, nitrocellulose must first be dehydrated and then dampened with alcohol; that is, water is first removed from a nitrocellulose slurry, and then the remaining nitrocellulose powder is dampened to a certain degree of alcohol moisture. In the late 1970's, efforts were undertaken by Hercules and the Corps of Engineers to automate the dehydration process and combine several functions into a single system. This new process, to be known as "C-Line" or "Continuous Thermal Dehydration Process," would, like all plant operations, be governed by safety regulations promulgated by various Army authorities. Though it is operated by a contractor, RAAP is a government facility subordiante to the Army Munitions and Chemical Command (AMCCOM) in Rock Island, Illinois. AMCCOM is in turn subordinate to the Army Materiel Command (AMC) in Alexandria, Virginia.

AMC promulgates regulations designed to effect and ensure safe practices at all subordinate facilities, of which RAAP is one. AMC's primary set of regulations known as AMCR 385-100–"the Bible," as the Government's head of safety at Radford called it. This compilation is entitled "Safety Manual;" the current governing manual was published in 1970 and occasional supplements or modifications are issued.

Charged with enforcing a contractor's compliance with these regulations and with independently implementing them is a Government safety staff at each installation. The entire

Government contingent at RAAP is known as the Contracting Officer's Representative staff. Part of this staff is devoted exclusively to safety.

In 1979 a hazard analysis was performed by Hercules personnel on the new dehydration process. The report identified several dangers in the system and made recommendations. Over a year later, armed with a copy of the report, the Government safety staff conducted a required preoperational survey and certified the process as safe if certain changes were implemented.

On May 6, 1981, a fire and explosion occurred in the "C-Line" process during only its second "proveout" or test run. Though it was a flash fire, and Petitioners were enveloped in flames less than a second after ignition, there was no dispute at trial over how the fire started. As the subsequent Army investigation found, the most likely cause was "an electrostatic discharge from the nitrocellulose in the container being filled to the grounded dust shroud which ignited a flammable alcohol/air mixture or a mixture of nitrocellulose dust and alcohol vapor." The Hercules investigation reached the same conclusion.

Petitioners are current and former employees of Hercules, Inc., who were working on the "C-Line" process at the time of the fire and explosion. Each Petitioner was severely burned in the incident. Their injuries include permanent disfigurement, extreme physical pain and suffering, mental anguish, and lost earnings.

Petitioners brought suit in the United States District Court for the Western District of Virginia against the United States under the Federal Tort Claims Act, 28 U.S.C. §§1346(b) and 2674 *et seq.*, for damages for injuries resulting from the fire. They alleged that the Government violated its duty to

them under Virginia tort law to take all necessary precautions against likely harm in an inherently dangerous activity.

As both the Army and Hercules investigations concluded that the fire was caused by a spark from the nitrocellulose in the tub, Petitioners focused their proof at trial on the tubs used in the C-Line process. These tubs were made of nonconductive rubber. Petitioners' theory was that the static charge building up in the nitrocellulose in the tub would have "bled off," or dissipated harmlessly into the ground had the tubs been made of conductive material. Instead, the tubs were nonconductive (they were the only nonconductive equipment in the entire operation), the charge could not dissipate, and the charge eventually ignited.

In support of this theory, Petitioners referred the district court to several military safety regulations. Primary emphasis was placed on AMCR 385-100 §20.4, reproduced at p. 71A *infra*. The regulation prescribes the types of containers to be used for intraplant transportation of hazardous materials. The containers are listed in descending order of preference; nonconductive rubber containers are not one of the listed choices.

The regulation states that containers "should" be made of the listed materials. Section 1.3 of the same safety manual, reproduced at p. 34A *infra*, however, provides that "advisory" provisions in which the words "may" or "should" are used are mandatory, and no deviation is permitted unless a waiver of compliance is secured in accordance with the waiver procedure set out in §1.5 (reproduced at Appendix p. 36A. It is undisputed that §20.4 was not complied with and that no waiver was secured.

At trial, the Government controverted Petitioners' theory of causation but did not dispute that the regulation on containers was violated. Petitioners also demonstrated that AMCR 385-100 §12.33(g), reproduced at p. 67A *infra*, was violated. The regulation explicitly requires for nitrocellulose dehydration operations a sprinkler system capable of delivering water within 50 milliseconds of ignition; the system in place could deliver water in not less than 150 milliseconds. It was undisputed that the existing system did not satisfy the explicit command of the regulation, that mandatory recommendations to change the sprinkler nozzles to increase system speed were not carried out, and that no waiver of compliance with the regulation was secured.

The entire trial on liability focused on the validity of Petitioners' theory of causation. Expert testimony was presented for both sides. Several months after the trial, the district court issued an opinion dismissing Petitioners' suit for lack of subject matter jurisdiction, finding that the discretionary function exception to the Federal Tort Claims Act barred their allegations of negligence. Addressing only on a motion for reconsideration Petitioners' contention that violations of mandatory safety regulations took the case out of the discretionary function exception, the district court inexplicably ignored AMCR 385-100 §1.3, and held that the use of the word "should" in §20.4, prescribing the permissible types of containers, made that regulation nonbinding.

On appeal, the Fourth Circuit affirmed in a brief per curiam opinion. Repeating the district court's apparent refusal to acknowledge the existence of §1.3 of the Army safety manual, an error by both lower courts which Petitioners are at a loss to explain, the court of appeals found that §20.4 "embraced the type of containers used at the Radford plant, even though the containers used were not specified in the regulation". The court of appeals stated finally

that "the violation of a mandatory regulation does not abrogate the government's tort immunity independently of the FTCA. . . ." Appendix p. 4A.

Petitioners contended throughout, and continue to contend, that the discretionary function exception protects from tort scrutiny only those decisions which are *policy* determinations. A decision must be grounded in a political, social or economic policy judgment to come within the exception. Congress sought in the FTCA to prevent judicial examination of public policy choices.

The district court, in holding the discretionary function exception applicable to Petitioners' claims, initially focused on a decision Petitioners did not charge as negligent and did not attack at trial: the decision to delegate primary responsibility for safety to the contractor and to retain a monitoring and enforcement role. Petitioners acknowledge that this decision is discretionary. Petitioners' grounds of negligence, however, were different: in enforcing safety requirements at RAAP, the Government made technical decisions concerning tubs and sprinklers which were negligent.

The Government pointed to no policy concerns in these decisions, and there is none. The Government safety manager at RAAP acknowledged his inability to formulate policy. Finally, mandatory regulations which governed the Government safety staff's actions remove any possible discretion and permit no deviation. These regulations reflect the previous discretionary determination of policy, but they eliminate any policy discretion in their fulfillment. These regulations were violated in this case.

Since no policy judgment was identified in the grounds of negligence alleged by Petitioners, the discretionary function exception cannot bar their claims. The decision between a

conductive and non-conductive tub is simply not the type of executive or administrative policy making that Congress wished to shield from judicial review.

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IRRECONCILABLY CONFLICTS WITH DECISIONS OF OTHER COURTS OF APPEALS

In light of its recent consideration of *Berkovitz v. United States*, No. 87-498 (see Part II, *infra*) the Court is undoubtedly familiar with the discretionary function exception and its previous treatment. Petitioners will detail the precise nature of their allegations, and briefly review this Court's two previous cases on the subject, before examining the conflicting appellate rulings.

A. What Are the Precise Governmental Decisions Complained of by Petitioners?

The Federal Tort Claims Act waives federal sovereign immunity against suit in tort. Immunity is preserved, however, against any claim

> based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused.

28 U.S.C. § 2680(a). Before determining whether the discretionary function exception bars Petitioners' suit, it is necessary to identify the exact allegations of negligence at issue.

Petitioners' theory below was that the use of conductive, rather than nonconductive, tubs to collect nitrocellulose in the thermal dehydration process would have prevented the nitrocellulose from sparking and causing the fire. Petitioners also contended that a faster fire protection system (sprinklers) should have been in place.

These, then, are Petitioners' tort claims: the engineering judgments concerning the tubs and sprinklers were negligent. Since Petitioners' actions are barred only if *their grounds of negligence* are discretionary functions, it is essential to understand what Plaintiffs are *not* suing over.

The decision identified by the courts below as discretionary was the "delegation of safety responsibility" to the contractor at RAAP. *Fortney v. United States*, 659 F.Supp. 127, 129 (W.D. Va. 1987). Petitioners, however, explicitly did *not* challenge this contractual delegation. Petitioners acknowledge that at all such installations, the contractor has the primary responsibility for ensuring the safety of operations, and the Government retains a monitoring role.

This division, of course, represents a policy determination –one which Plaintiffs do not challenge. Petitioners *do* challenge, however, the Government's engineering decisions in fulfillment of its chosen role.

Had the Government decided to play no role at all at Radford, it would have been a discretionary decision; indeed, whatever role the Government assumed at Radford is the result of policy judgment. Presumably after weighing many factors, the Government formulated a policy, reflected in various regulations, that safety staffs at plants such as Radford would be of a certain size, and that, among other duties, these staffs would conduct preoperational surveys of new processes to determine if they are safe. Whether this scheme

of things at such plants is a good idea, whether it likely contributes to safety, whether the safety staffs are too large or too small–these are all questions which are irrelevant to Petitioners' tort claims. They alleged, rather, that in doing its prescribed preoperational survey, *the Government safety staff made the wrong decision on what kind of tub to use.*

It is important to distinguish here between the source of the Government's duty to Petitioners and whether acts or omissions in respect of that duty are discretionary. Under the Tort Claims Act, the Government is liable to the same extent as a private individual would be under Virginia law. 28 U.S.C. §1346(b). In this case, Respondent, having delegated to a contractor the performance of an inherently dangerous activity, retained the duty to take all necessary precautions to guard against likely harm.[1] *T.E. Ritter Corp. v. Rose*, 200 Va. 736, 107 S.E. 2d 483 (1959). While the United States cannot escape this duty, some decisions made in fulfilling or failing to fulfill the duty may be discretionary; other decisions are not.

Again, at the risk of repetition, Petitioners did *not* challenge the delegation of responsibility to Hercules. The nature of the duties the Government assumed at Hercules–e.g., whether to conduct preoperational surveys–reflects a policy determination. It is the *technical implementation* of that policy determination–here, *determining whether the equipment met mandatory regulations*–that Petitioners complained of.

---

1. There was no dispute at trial that nitrocellulose dehydration is an inherently dangerous activity. See, e.g., AMCR 385-100 §12.33(g) (II-841).

B. The Discretionary Function Exception Only Protects Social, Economic and Political Policy Judgments.

This Court has twice defined the meaning of the discretionary function exception. These holdings demonstrate that only those governmental decisions in which policy considerations play a determinative role are exempt from liability.

In *Dalehite v. United States*, 346 U.S. 15 (1953) plaintiffs charged the Government with negligence in various aspects of a program of production and distribution of ammonium nitrate fertilizer. In holding the claims barred, the Court made clear that the challenged decision must reflect a determination involving policy. It wrote:

> The discretionary function or duty that cannot form a basis for suit under the Tort Claims Act includes more than the initiation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications, or schedules of operations. *Where there is room for policy judgment, there is discretion.*

Id., 346 U.S. at 35-36 (emphasis added). Thus, while all governmental officials have "discretion," in the literal sense of the work, to act one way or another, their choices are protected only if policy judgments are involved.

The Court again considered the exemption in *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797 (1984). In *Varig*, plaintiffs sued for harms suffered when an airplane crashed because of violations of FAA safety regulations. Plaintiffs challenged the FAA's decision to employ a spot check system of inspecting aircraft for compliance with regulations.

The Court first held that the rank of the governmental official involved in immaterial; it is rather the "nature of the conduct" at issue that is important. *Id.*, 467 U.S. at 813. In other words, even a low-ranking subordinate may make decisions protected by the discretionary function exception. Whatever the official's status, however, his conduct is immune from suit only if a policymaking determination is involved. The Court continued:

> This emphasis upon protection for regulatory activities suggests an underlying basis for the inclusion of an exception for discretionary function in the Act: Congress wished to prevent judicial "second-guessing" of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort. By fashioning an exception for discretionary governmental functions, including regulatory activities, Congress took "steps to protect the Government from liability that would seriously handicap efficient government operations." *United States v. Muniz*, 374 U.S. 150, 163, 83 S.Ct. 1850, 1858, 10 L.Ed. 2d 805, 815 (1963).

Id. at 814 (emphasis added). *Dalehite* and *Varig* thus teach that governmental decisions "grounded in social, economic, and political policy" are the decisions immune from judicial scrutiny. The Court in *Varig* took pains to clarify this assessment of the exception:

> Here, the FAA has determined that a program of "spot-checking" manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation

> safety and the reality of finite agency resources. Judicial intervention in such decision-making through private tort suits would require the courts to "second-guess" the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

Id. at 820 (emphasis added).

It is thus clear from the Supreme Court's treatment of the discretionary function exception that a decision must have policy attributes to be shielded; "judicial intervention in policymaking" is the evil to be avoided. This Court has likewise required a showing that a policy judgment was involved for the exception to control.

C. The Decision Below Is in Direct Conflict with Several Appellate Decisions.

The Fourth Circuit wrote that "violation of a mandatory regulation does not abrogate the government's tort immunity independently of the FTCA . . ." Appendix, p. 4A. This inscrutable statement demonstrates the Court of Appeals' fundamental misapprehension both of the nature of FTCA liability and of the role of the discretionary function exception. Petitioners did not and could not contend that the violation of a regulation furnishes a cause of action against the Government. It is the FTCA and the governing local law that provides the cause of action; violation of a mandatory regulation is evidence of negligence. Moreover, the regulation shows that *policy has previously been made* and insulated discretion already exercised.

Numerous courts of appeals have concluded that violations of mandatory regulations remove a suit from the ambit of the discretionary function exception. The ruling below conflicts most strikingly with *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985). Exactly as in the present case, *McMichael* involved the government safety staff's failure to enforce mandatory safety regulations at a military production plant run by a contractor. The Eighth Circuit initially ruled that the discretionary function exception did not bar suit for failure to enforce compliance with the regulations. *Madison v. United States*, 679 F.2d 736 (8th Cir. 1982). After *Varig*, the court directed supplemental briefing on that case's impact.

In its second ruling, the Eighth Circuit found *Varig* "entirely consistent with our prior decision. The discretion does not bar the Plaintiff's suit for failing to enforce the safety regulations in the contract." 751 F.2d at 306. The court first noted that when the Government acts in a proprietary, rather than a regulatory, capacity, as when it contracts for military production and retains supervision of the inherently dangerous activities for which it contracts, *Varig's* "admonition to avoid judicial second-guessing of regulatory decisions is of less force." *Id.*

More fundamentally, the court recognized that the safety inspectors were not making policy, and that therefore their decisions could properly be the subject of a tort suit:

> The inspectors' regular procedures included a fifty-one step procedure review checklist for safety compliance. Thus, the Defense Department inspectors were not called upon to make discretionary regulatory judgments. Rather, they had a number of precise inspec-

> tions to perform which involved no judgment concerning agency policy.

Id. at 307.

The factual setting and legal issue in *McMichael* and in the present case are identical. Petitioners submit that the rulings simply cannot co-exist if the discretionary function exception is to be construed in any principled manner, and that this Court should reconcile them by reversal of the decision of the court below.

The Eighth Circuit recently reaffirmed the reasoning of *McMichael* in *Aslakson v. United States*, 790 F.2d 688, 693 (8th Cir. 1986), in which it held that "[w]here the challenged governmental activity involves safety considerations under an established policy rather than the balancing of competing public policy considerations, the rationale for the exception falls away and the United States will be held responsible for the negligence of its employees." In *Aslakson*, a sailboat operator struck powerlines which had not been elevated according to governing National Electric Safety Code rules. The rules left some judgment to officials, but not the sort of judgment contemplated by the discretionary function exception. *Id.* at 693 ("although such a policy necessarily involves some degree of judgment on the part of government officials, it is not the kind of judgment that involves the weighing of policy considerations").

The Fifth Circuit reached the same result in another recent explosion case. In *Collins v. United States*, 783 F.2d 1225 (5th Cir. 1986), failure by OSHA officials to reinstitute a "danger order" and to reclassify a mine as "gassy" led to an explosion in the mine. The Government moved to dismiss under the exception. The district court denied the motion, and the Fifth Circuit affirmed in an opinion containing an

extensive discussion of *Varig* and *Dalehite*. Noting that "the presence of a choice does not necessarily mean that there is discretion under §2680(a)," the court made clear that it was the absence of any policy consideration in the challenged actions that compelled its conclusion:

> It is apparent that the decision to annul Imminent Danger Order No. 195 was a decision only remotely related, if related at all, to social, economic, or political policy. . . . *The government suggests no policy reason for that action, and none is apparent to us.*

Id. at 1230 (emphasis added). Likewise, the failure to follow a mandatory regulation on classification of mines as gassy if a certain level of methane is present was devoid of the necessary policy attributes:

> A subordinate charged with enforcing 30 C.F.R. §57.21-1(c) during the relevant period therefore had no room for policy judgment or decision once methane levels exceeding .25 percent had been detected. Failure to reclassify the mine as gassy represented disobedience of official directions, simple and unadorned. . . . To the extent that an employee refuses to carry out a mandatory statute or regulation, one which leaves him no discretion in the manner or extent to which it will be enforced, the employee is simply disobeying a flat command. In this instance, *any available discretion had been exercised when the command was adpoted; appellees' challenges do not threaten that discretion.*

Id. at 1231 (emphasis added).

Since there was no policy discretion in the decision attacked, the suit could proceed. The case is also notable for Judge Brown's concurrence, in which he wrote to "make clear that the Federal Tort Claims Act is not dead" and is not confined to automiblie collisions or medical malpractice. He further found that the dual purposes of the FTCA –to compensate victims of government negligence and to free the government from the unwieldy private bill system which previously had served, clumsily, to reimburse then–would be thwarted by restrictive application of the Act. *Id.* at 1231-33.

Toole v. United States, 588 F.2d 403 (3d Cir. 1978) is another similar case. Toole was the employee of a contractor making antitank explosives at a munitions plant in Philadelphia. She was killed when the shield behind which she operated levers failed to withstand an explosion. The government knew the shield had been insufficiently tested and could be unsafe but failed to warn the contractor or Toole. Succinctly dismissing the discretionary function exception, the Third Circuit noted that "[t]he decision whether or not to warn Mrs. Toole *did not require any judgments about policy*. The Government did not need to reach a balance of such factors as the cost of Government programs against the potential benefit.' " 588 F.2d 403, 407 n.4, quoting *Griffin v. United States*, 500 F.2d 1059, 1064 (3d. Cir. 1974) (emphasis added). Just as in *Toole*, the Government employees' decisions attached in this case required no judgments about policy. See also *Aretz v. United States*, 604 F.2d 417 (5th Cir. 1979), opinion vacated, 616 F.2d 254 (5th Cir. 1980) (en banc), certified question answered, 248 Ga. 19, 280 S.E.2d 345 (1981), panel opinion reinstated, 660 F.2d 531 (5th Cir. 1981) (explosion at munitions plant).

Pelham v. United States, 661 F.Supp. 1063 (D.N.J. 1987), was a suit for injuries suffered in a construction accident at at Picatinny Arsenal in Dover, New Jersey. Plaintiffs complained of negligence in the enforcement of military construction safety regulations. The district court readily held the adoption of a spot check program and the development of the safety provisions discretionary, but the "ministerial implementation of safety regulations" was outside the exception.

In *Petznick v. United States*, 575 F.Supp. 698 (D. Neb. 1983), the government failed to enforce compliance with "policies of the United States Air Force with respect to electrical work" contained in an Air Force safety manual. The discretionary function exception was held inapplicable because the government employee "was not formulating policy when he decided to allow the work to be performed on energized lines in this case." 575 F.Supp. at 702, 703. See also *Barron v. United States*, 473 F.Supp. 1077 (Hawaii 1979), *modified*, 654 F.2d 644 (9th Cir. 1981) (failure to correct safety problems not discretionary where contractor disregarded significant safety requirements of Corps of Engineers safety manual).

In each of these cases, different courts found that violations of mandatory regulations precluded dismissal under the discretionary function exception. In each case the court recognized that a regulation embodies previously determined policy. The "discretion" protected by the exception–the uniquely governmental task and privilege of formulating policy–is exercised in promulgating the regulation. Since those charged with complying with the regulation are not making policy, are not making the sort of social, economic and political judgments Congress wished to protect, those officials' negligent failures to satisfy regulations are actionable. For other holdings standing for the same proposition, *see, e.g., Denham v. United States*, 834 F.2d 518 (5th Cir.

1987); *Sheridan Transportation Co. v. United States*, 834 F.2d 467 (5th Cir. 1987); *ARA Leisure Services v. United States*, 831 F.2d 193 (9th Cir. 1987); *Caraballo v. United States*, 830 F.2d 19 (2d Cir. 1987); *Chotin Transportation, Inc. v. United States*, 819 F.2d 1342 (6th Cir. 1987) (en banc).

In holding that the violation of a mandatory regulation was irrelevant to discretionary function exception analysis, the Fourth Circuit departed sharply from the holdings in these cases, and the ruling simply cannot be reconciled with *McMichael* or any of the other cases cited. This Court should eliminate the confusion.

The Fourth Circuit cited *Totten v. United States*, 618 F.Supp. 951, 954 (E.D. Tenn. 1985), *aff'd*, 806 F.2d 698 (6th Cir. 1986), in support of its statement that mandatory regulations do not affect the discretionary function inquiry. *Totten* involved an explosion at a military site as well. The holding in *Totten* at best compounds the disagreement among the courts of appeals as to the significance of mandatory regulations, and so, if anything, should underscore the need for Supreme Court clarification. Moreover, *Totten* relies exclusively on *Feyers v. United States*, 749 F.2d 1222 (6th Cir. 1984), which also involved Government safety supervision over military contractors. In *Feyers*, the Sixth Circuit made clear that violations of precisely the same manual at issue herein, AMCR 385-100, *would* impose FTCA liability:

> While the discretionary function exception does not apply where mandatory guidelines or regulations are violated . . . this rule is inapplicable in this case since neither the AMC safety manual, AMC 385-100, nor any other provision of the contract required specific safety measures in the railyard.

Id. at 1227 n.7 (citations omitted).

Thus, in the Sixth Circuit, violation of AMCR 385-100 is actionable; in the Fourth Circuit it is not. There could not be a more apparent, less sensible conflict between the Circuits than that presented in this case.

D. The Mandatory Regulation At Issue Herein

While holding that violation of a mandatory safety regulation did not affect the discretionary function exception analysis, the Fourth Circuit also stated that it "agree[d] with the district court" that the regulation embraced the type of container used at the Radford plant, even though the containers used were not specified in the regulation." This conclusion represents a manifest error of fact.

AMCR 385-100 §20.4 states that containers "should" be made of one of the listed options; the nonconductive rubber tubs used are not listed as an option. The district court's conclusion that "should" means that the regulation is not mandatory is flatly and inexplicably wrong: §1.3 of AMCR 385-100 states that regulations using "should" are mandatory unless a waiver of compliance is secured in accordance with the waiver procedures in §1.5. It is undisputed that no such waiver was ever sought, let alone granted.

Petitioner frankly cannot explain the two courts' ability to ignore the provisions of the manual. In any event, §20.4

plainly was violated.[2]

More fundamentally, perhaps, assuming arguendo that conductive tubs were somehow not required by these regulations, was there some political, social or economic policy consideration that demanded a nonconductive rather than a conductive tub? Of course not: this was a run-of-the-mill electrical engineering problem.

Petitioners claim that the use of nonconductive tubs was negligent and violated controlling regulations; the Government denies it was negligent. The issue for this Court is whether a dispute over what kind of tub to use is the type of tort claim that the courts have no business deciding. Was this executive or administrative decisionmaking, grounded in political, social or economic policy judgments? Did this suit require a judge to second-guess governmental officials formulating public policy?

The Government did not assert, let alone prove, a single concern remotely related to policy involved in the decisions attacked in this case. Moreover, the Government's witnesses explicitly disclaimed any ability to formulate policy or deviate from the regulations.

---

2. If the district court's opinion is read to find insulated discretion when a regulation permits choices of materials to be used, then that position conflicts directly with *United States Fire Ins. Co. v. United States*, 806 F.2d 1529 (11th Cir. 1986). That case involved Coast Guard negligence in maintaining wreck markers: the relevant manual of procedures listed various methods of performance. The Coast Guard selected the method of last resort. On appeal, the Government argued that selection of an approved method, even if an inferior one, insulated it from liability. The Eleventh Circuit disagreed, holding that the choice of methods was obviously not a policy decision. Here of course, the use of nonconductive tubs was not even a permissible option.

If injured citizens cannot sue over the type of decision attacked in this case, the Federal Tort Claims Act may as well be repealed.

II. THIS CASE SHOULD BE DECIDED IN LIGHT OF *BERKOVITZ V. UNITED STATES*

On April 19, 1988, this Court heard argument in *Berkovitz v. United States*, No. 87-498. Petitioners respectfully submit that given the close similarity between this case and *Berkovitz*, resolution of this case should come in light of *Berkovitz*.

Plaintiffs in *Berkovitz* sued the Government for negligence in licensing production lots of strains of polio vaccine. Applicable regulations required that for licensing, the manufacturers demonstrate that the neurovirulence of the strains not exceed specific, previously established quantitative levels. Plaintiffs alleged that despite a clear disparity between the submitted neurovirulence data and the required numbers in the regulations, the lots were licensed. The Third Circuit found such conduct protected by the discretionary function exception. *Berkovitz v. United States*, 822 F.2d 1322 (3d Cir. 1987). The Ninth and Eighth Circuits had found identical conduct fully actionable. *Baker v. United States*, 817 F.2d 560 (9th Cir. 1987); *Loge v. United States*, 662 F.2d 1268 (8th Cir. 1981), *cert. denied*, 456 U.S. 944 (1982).

It is anticipated that this Court's resolution of *Berkovitz* will be dispositive of the discretionary function issue herein, since *Berkovitz* will decide whether negligent violation of mandatory regulations is protected by the discretionary function exception. Petitioners in *Berkovitz* make an identical argument to that advanced by the Petitioners herein: the Government exercises discretion when it decides whether, and to what extent, to regulate or supervise the conduct of private individuals. Once such decisions are made, however,

and detailed regulations embodying and implementing those discretionary choices are promulgated, the negligent failure of functionaries to fullfil the regulations is fully actionable. The ensuring tort suit will not expose "legislative and administrative decisions grounded in social, economic and political policy to judicial second-guessing."

Petitioners note that the only meaningful difference between *Berkovitz* and this case is that here, the Government acted in a proprietary role, rather than as a regulator of private conduct. In this context, the discretionary function exception is of even less moment. *McMichael, supra*.

In any event, *Berkovitz* will clarify the significance of mandatory regulations for discretionary function cases. Petitioners respectfully suggest that the Court grant certiorari in this case for disposition or remand in light of *Berkovitz*.

CONCLUSION

Wherefore, premises considered, Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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BY Brent M. Rosenthal pmc
BRENT M. ROSENTHAL

– AND –

BY Charles S. Siegel pmc
CHARLES S. SIEGEL

– AND –

BY Brian D. Weinstein pmc
BRIAN D. WEINSTEIN

APPENDIX

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1636

UNPUBLISHED
(stamp)

MARK LYNN FORTNEY;
ESLEY DOUGLAS TIPTON;
DANIEL WEBSTER HARMON
Plaintiffs - Appellants

and

MARY E. TIPTON; MARY JANE HARMON
Plaintiffs

versus

UNITED STATES OF AMERICA
Defendant - Appellee

and

ENVIROTECH CORPORATION; AMERICAN AIR FILTER CO., INC.; ANACON CORP.; SOUTHEASTERN SPRINKLER COMPANY, INC.; GRINNEL FIRE PROTECTION SYSTEMS COMPANY, INC.; AMERICAN DISTRICT TELEGRAPH CO.; MILTON ROY COMPANY; TATE ENGINEERING, INC.; REXNORD, INC.; DREXEL BROOK ENGINEERING CO.; RUBBERMAID COMMERCIAL PROD.; INC.; UNIJAX, INC.; E. I. PFAFF CO., INC.; SIMONS EASTERN CO.; C. P. ROBERTS ENGINEERING, INC.; YEARGIN CONSTRUCTION CO., INC.; SHELL OIL CO.; DEVON CHEMICALS, INC.; PUBLIKER INDUSTRIES, INC.; BUCKEYE CELLULOSE CORP.; SYBRON CORP.; CARTER AND CRAWLEY, INC.

Defendants

HERCULES, INCORPORATED
Third Party - Defendant

Appeal from the United States District Court for the Western District of Virginia, at Abingdon.
Glen M. Williams, District Judge.
(C/A 83-0200-A, C/A 83-0201-A, C/A 83-0202-A)

Argued: January 5, 1988 Decided: February 22, 1988

Before RUSSELL and ERVIN, Circuit Judges, and SPENCER, United States District Judge for the Eastern District of Virginia, sitting by designation.

Charles Stein Siegel (Brian Weinstein; Baron & Budd on brief) for Appellants; Thomas Rutledge King, Jr., Assistant United States Attorney (John P. Alderman, United States Attorney on Brief) for Appellee.

PER CURIAM:

Plaintiffs in three Federal Tort Claims Act (FTCA) cases consolidated below appeal the judgment dismissing their complaints after trial for lack of subject matter jurisdiction.

We address first appellants' motion for leave to file a memorandum of clarification, which was received in this Court, with the memorandum, after oral argument in this case. Our briefing and oral argument requirements are designed to encourage thorough presentation of the parties' positions while at the same time serving the important purposes of orderly procedure and finality. Finding no cause to deviate from those requirements in this case, we deny the motion.

On May 6, 1981 an experimental system for the dehydration of nitrocellulose exploded, severely burning plaintiffs. The explosion occurred at the Radford Army Munitions Plant, which is owned by the United States Army and operated under a contract with Hercules, Inc. Plaintiffs were Hercules employees.

The Army's contract with Hercules delegates broad responsibility for safety at the Radford plant to Hercules, including particularly the safety of Hercules personnel. The Army retains the right under this contract to inspect the premises for quality, security, and safety, and maintains a small staff at the plant for this purpose. Plaintiffs alleged in the district court that the government had failed to use reasonable procedures to assure that Hercules in turn took appropriate safety precautions in operating the dehydration process in question.

The district court found that the Army's supervisory responsibilities relating to safety lay within the discretionary function exception. This statutory exemption preserves sovereign immunity as to FTCA claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C.A. § 2680(a) (West 1965). The district court founded its analysis on the Supreme Court's teaching that "[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority fo the most basic kind." *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 819-20 (1984). This principle extends to on-location supervisory activities of agency employees. *See Dalehite v. United States*, 346 U.S. 15, 36 (1953). The district court, extending the *Varig Airlines*

principle beyond the regulatory context to the context of government production contracts, found that, on the record in the case at bar, the delegation of safety responsibility to Hercules left the Army with solely discretionary safety functions to perform at the Radford plant.

Our review discloses no reversible error in the decision below,[1] and convinces us that plaintiffs' claims were properly dismissed. We therefore affirm on the reasoning of the district court.

AFFIRMED.

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1. The district court rejected plaintiffs' argument that the government was not entitled to discretionary function immunity in this case because the explosion was traceable in part to a violation of a mandatory safety regulation governing permissible containers for hazardous materials. The district court found that this regulation embraced the type of container used at the Radford plant, even though the containers used were not specified in the regulation. We agree with the district court, but add that violation of a mandatory regulation does not abrogate the government's tort immunity independently of the FTCA, and that the discretionary function exception to the FTCA protects the government from liability "whether or not the discretion involved be abused." 28 U.S.C.A. § 2680(a) (West 1965); *see Totten v. United States*, 618 F. Supp. 951, 954 (E.D. Tenn. 1985), *aff'd* 806 F.2d 698 (6th Cir. 1986).

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 87-1636

MARK LYNN FORTNEY;
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DANIEL WEBSTER HARMON
Plaintiffs - Appellants

and

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Defendants

HERCULES, INCORPORATED
Third Party - Defendant

FILED

U.S. Court of Appeals
Fourth Circuit
(stamp)

Clerk's Office U. S. Dist. Court
At ABINGDON, VA.
FILED
MAR 15 1988
Joyce F. Witt, Clerk
By: s/s A. Cook
Deputy Clerk
(stamp)

APPEAL FROM THE United States District Court for the Western District of Virginia.

THIS CAUSE came on to be heard on the record from the United States District Court for the Western District of Virginia, and was argued by counsel.

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this cause, be, and the same is hereby, affirmed.

s/s JOHN M. GREACEN (stamp)
CLERK

A True Copy, Teste:
John M. Greacen, Clerk
By s/s C. Marshall Buckles
Deputy Clerk
(stamp)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

CIVIL ACTION NO. 83-0200-A

MARK LYNN FORTNEY,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

CIVIL ACTION NO. 83-0201-A

ESLEY W. TIPTON,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

CIVIL ACTION NO. 83-0202-A

DANIEL WEBSTER HARMON,
Plaintiff

v.

UNITED STATES OF AMERICA,
Defendant

Clerk's Office U. S. Dist. Court
AT ABINGDON, VA
F I L E D
APR 21 1987
Joyce F. Witt, Clerk
By: s/s A. Cook
Deputy Clerk
(stamp)

MEMORANDUM OPINION

These three consolidated cases are presently before the court for judgment following a bench trial.

The Radford Army Ammunitions Plant ("R.A.A.P.") is a munitions factory that the United States Army owns. The Army has contracted with Hercules, Inc. ("Hercules") to operate R.A.A.P. Hercules is responsible for safety at R.A.A.P. (Plaintiffs' Exhibits 9, 98-99, and 192); but the Army has retained the right to inspect the premises for quality, security, and safety and, consequently, maintains a small staff at the plant.

One of the intermediate processes that Hercules carries on at R.A.A.P. is the dehydration of nitrocellulose. In the 1960's Hercules began experimenting with automating this process, and in December 1980 Hercules instigated a trial period for one specific automated dehydration system. On May 6, 1981 this experimental system exploded severely burning plaintiffs; and they subsequently brought suit pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. §§ 2671-80, alleging that the government had failed to use reasonable procedures to assure that Hercules utilized necessary safety precautions in its performance of hazardous work.

The FTCA largely abrogates the federal government's immunity from tort liability. However, the FTCA preserves that immunity for claims "based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. § 2680(a). This exemption from tort liability is commonly referred to as the discretionary function exception ("d.f.e.").

The Supreme Court first explored the d.f.e. in *Dalehite v. United States*, 346 U.S. 15 (1953). In *Dalehite* fertilizer that had been produced as part of a government program to aid war ravaged countries exploded aboard a ship levelling much of Texas City, Texas and killing many persons; and plaintiffs sued for negligent manufacture.[1] The Court held the United States was not liable because the d.f.e. protects the government from tort liability for "the discretion of the executive or the administrator to act according to . . . [his] judgment of the best course . . ." *Dalehite*, 346 U.S. at 34. The Court then explained that the d.f.e. "includes more than the iniation of programs and activities. It also includes determinations made by executives or administrators in establishing plans, specifications or schedules of operation." *Dalehite*, 346 U.S. at 35-36. Finally the Court extended this immunity to the "acts of subordinates in carrying out the operations of government in accordance with official directions." *Dalehite*, 346 U.S. at 36.

The Court further developed the parameters of the d.f.e. in *United States v. S. A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984), ("*VARIG*"). In *VARIG*

1. One of the ingredients of the fertilizer was a commonly recognized explosive.

two commercial aircrafts that the Federal Aviation Administration ("FAA") had certified as airworthy caught on fire mid-air due to the existence of non-regulation equipment. The Court held the FAA was not liable in tort for its decision to delegate some inspection responsibility to aircraft manufacturers and to only conduct spot checks. The Court explained:

> When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind. Decisions as to the manner of enforcing regulations directly affect the feasibility and practicality of the Government's regulatory program; such decisions require the agency to establish priorities for the accomplishment of its policy objectives by balancing the objectives sought to be obtained against such practical considerations as staffing and funding. Here, the FAA has determined that a program of 'spotchecking' manufacturers' compliance with minimum safety standards best accommodates the goal of air transportation safety and the reality of finite agency resources. Judicial intervention in such decisionmaking through private tort suits would require the courts to 'second-guess' the political, social, and economic judgments of an agency exercising its regulatory function. It was precisely this sort of judicial intervention in policymaking that the discretionary function exception was designed to prevent.

VARIG, 467 U.S. at 819-20. The Court also indicated that it is the "nature of the conduct, rather than the status of the

actor" that determines applicability of 28 U.S.C. § 2680(a). *VARIG*, 467 U.S. at 813.

Applying the *Dalehite* and *VARIG* analyses to the instant facts indicates the government is not liablie in tort for failure to use reasonable procedures to assure that Hercules utilized necessary safety precautions. The government's decisions concerning the production of munitions including its delegation to Hercules of primary responsibility for safety furthers the objectives of our national defense and, consequently, represent the nature of conduct that the d.f.e. excepts from tort liability. And, as the Court has indicated, this immunity necessarily applies to lower level decision makers as well.

The Sixth Circuit has decided two cases that provide additional support for this court's analysis. In *Feyers v. United States*, 749 F.2d 1222 (6th Cir. 1984), *cert. denied*, 105 S. Ct. 2655, a Chrysler employee was injured when working at a government owned facility pursuant to a contract between Chrysler and the United States. The Court held that United States' decisions to delegate responsibility for safety to Chrysler, to only conduct spot checks of Chrysler's safety program, and to not institute a safety training program are the type of discretionary functions excluded from the FTCA's waiver of sovereign immunity. The Sixth Circuit, inter alia, examined the contract between Chrysler and the United States, which assigned responsibility for safety to Chrysler, and the relationship of Chrysler to the United States, which was independent contractor rather than employee. And in *Totten v. United States*, No. 85-5921 (6th Cir. Dec. 9, 1986), the widow of a former employee of an independent contractor sued the government for failure to comply with a Department of Defense standard and for failure to assure use of safety precautions after her husband was killed when cleaning up missile fuel pursuant to a contract between the independent contractor and the government

that delegated primary safety responsibility to the independent contractor. The Court held the d.f.e. precludes tort liability for the underlying decisions "[b]ecause an exercise of discretion was required in implementing [Department of Defense] Standard 882A and in determining the extent to which the government should review Aerojet's compliance with the safety responsibility delegated to it." *Totten*, No. 85-5921 at 8.

This court cannot distinguish the instant facts from *Feyers* or *Totten* in regard to the nature of the underlying contract: all three contracts delegate primary responsibility for safety to the independent contractor with the government's retaining the right to review safety procedures. As the *VARIG* Court indicated, this delegation of safety responsibility represents the type of policy-making for which the d.f.e. was designed.

Accordingly, 28 U.S.C. § 2680(a), the discretionary function exception, bars plaintiffs' suits against the United States. Case law is clear that "[i]f a case falls within the statutory exceptions of 28 U.S.C. § 2680, the Court lacks subject matter jurisdiction." *Feyers v. United States*, 749 F.2d at 1225. Consequently, these cases are dismissed for lack of subject matter jurisdiction.

In accordance with this Memorandum Opinion, an Order will be entered dismissing these cases for lack of subject matter jurisdiction and striking these cases from the docket.

The Clerk is directed to send certified copies of this Memorandum Opinion to counsel of record.

ENTER: This 21 day of April 1987.

s/s Glen M. Williams
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: s/s A. Cook
Deputy Clerk
(stamp)

(Note: Circular illegible stamp on page.)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

CIVIL ACTION NO. 83-0200-A

MARK LYNN FORTNEY,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. 83-0201-A

ESLEY W. TIPTON,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. 83-0202-A

DANIEL WEBSTER HARMON,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Clerk's Office U. S. Dist. Court
AT ABINGDON, VA
F I L E D
APR 21 1987
Joyce F. Will, Clerk
By: s/s A. Cook
Deputy Clerk
(stamp)

ORDER

In accordance with a Memorandum Opinion entered this date, these cases are dismissed for lack of subject matter jurisdiction. Accordingly, these causes are stricken from the docket.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 21 day of April, 1987.

s/s Glen M. Williams
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: s/s A. Cook
Deputy Clerk
(stamp)

IN THE UNITED STATES DISTRICT COURT
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UNITED STATES OF AMERICA,

Defendant

Clerk's Office U. S. Dist. Court
AT ABINGDON, VA
F I L E D
JUN 8 1987
Joyce F. Witt, Clerk
By: s/s D. S. Slemp
Clerk
(stamp)

MEMORANDUM OPINION AND ORDER

These three consolidated cases are presently before the court on plaintiffs' motion for reconsideration.

The Radford Army Ammunitions Plant ("R.A.A.P.") is a munitions factory that the United States Army owns. The Army has contracted with Hercules, Inc. ("Hercules") to operate R.A.A.P. On May 6, 1981 an experimental system exploded at R.A.A.P. severely injuring plaintiffs; and they subsequently brought suit pursuant to the Federal Tort Claims Act ("FTCA"), 28 U.S.C. § 2671-80. This court dismissed that action for lack of subject matter jurisdiction because the discretionary function exception ("d.f.e.") to the FTCA, 28 U.S.C. § 2680(a), immunizes the government from suit for its alleged failure to use reasonable procedures to assure that Hercules utilized necessary safety precautions in its performance of hazardous work. *Fortney v. United States*, No. 83-0200-A (W.D. Va. April 21, 1987).

Plaintiffs have moved this court for reconsideration of its earlier decision. They contend that the court (1) incorrectly identified the action that plaintiffs challenge; (2) erroneously applied the d.f.e. to a mandatory regulation; and (3) failed to consider relevant cases of the Fourth Circuit Court of Appeals. This court will discuss these assertions in order.

Plaintiffs allege that this court incorrectly identified the governmental action that they challenge as delegating primary safety responsibility to Hercules when in fact plaintiffs challenge "the negligence of the government safety stafff [sic] in allowing Building 3507 to pass the Pre-Operational Survey Inspection and, thereby, operate with nonconductive tubs in violation of AMCR 385-100." Plaintiffs' Motion for Reconsideration and Oral Argument and Memorandum in Support Thereof p. 5.

After reviewing Plaintiffs' motion for Judgment and Memorandum in Support Thereof, this court cannot accept plaintiffs' characterization of their earlier allegation. In fact, Plaintiffs' Memorandum in Support of Motion for Judgment refers to the Army's failure to adequately evaluate the use of nonconductive tubs and specifically says "[i]f the Government failed to see to the taking of all reasonable precautions in this operation, the Government is liable to Plaintiffs." Plaintiffs' Motion for Judgment and Memorandum in Support Thereof p. 2. This failure to adequately evaluate aligns much more closely with a discretionary act than with an operational act and is consequently immunized.

Plaintiffs also allege that the d.f.e. cannot immunize the government for its violation of a mandatory regulation, i.e. A.M.C.R. 385-100 § 20.4 (1970).

A.M.C.R. 385-100 § 20.4 (1970) provides:

> Hazardous materials in bulk or liquid form must be transported in containers which will prevent leakage. Containers used in intraplant transportation and service storage of explosives and explosive mixtures such as initiating explosives, pyrotechnic compositions and

tracer materials should be made of material in the following preference order:

> Conductive rubber
>
> Nonferrous metal-lined boxes without seams or rivet heads under which explosive dust can accumulate
>
> Plastics (conductive type only)
>
> Paper-lined wood boxes
>
> Fiber containers.

Fiber containers of bulk explosives and propellants should be shipped only by motor carrier or trailer-on-flat car. Glass containers should not be used because of their fragility and severe missile hazard.

This regulation's use of the word "should" implies that the use of conductive tubs is not mandatory. "Should, in indicating obligation or necessity, is . . . appreciably weaker than *must*." *The American Heritage Dictionary* 1199 (W. Morris ed. 1976). Furthermore, § 20.4's listing of options utilizing nonconductive tubs clearly indicates that the drafters of § 20.4 contemplated situations in which nonconductive tubs would be used.

Plaintiffs compare the government's failure to object to nonconductive tubs to a decision whether to brake or accelerate that a government employee makes while driving to inspect a building. This analogy does not persuade the

court. The government's decision in the instant case reflected many factors and typifies a decision that the d.f.e. was designed to protect. On the other hand, a decision whether to brake or accelerate provides the stereotypical example of a tort for which the FTCA abrogated sovereign immunity.

Plaintiffs have cited five cases in support of their contention that the d.f.e. is inapplicable in the context of accidents at military plants run by contractors where safety was monitored by the government. However, four of these cases were decided prior to *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984) ("*VARIG*").

Plaintiffs' final argument is that this court failed to consider relevant decisions of the Fourth Circuit Court of Appeals. They rely primarily on *Staton v. United States*, 685 F.2d 117 (4th Cir. 1982). However, *Staton* held that the d.f.e. does not immunize a park ranger's shooting of hunting dogs in violation of a policy to capture such dogs. The instant facts do not demonstrate a comparable policy void of contemplated discretion.

This court cannot imagine a more elusive concept than the discretionary function for which the FTCA retains sovereign immunity. Almost every court that considers this concept necessarily redefines it. However, plaintiffs' disagreement with this court's earlier decision does not justify a self-imposed reversal.

Accordingly, plaintiffs' motion for reconsideration is hereby DENIED. These causes are again stricken from the docket.

The Clerk is directed to send certified copies of this Memorandum Opinion and Order to counsel of record.

ENTER: This 8 day of June, 1987.

s/s Glen M. Williams
UNITED STATES DISTRICT JUDGE

A True Copy, Teste:
Joyce F. Witt, Clerk
By: s/s D. S. Slemp
Deputy Clerk
(stamp)

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF VIRGINIA
ABINGDON DIVISION

CIVIL ACTION NO. 83-0200-A

MARK LYNN FORTNEY,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. 83-0201-A

ESLEY W. TIPTON,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

CIVIL ACTION NO. 83-0202-A

DANIEL WEBSTER HARMON,

Plaintiff

v.

UNITED STATES OF AMERICA,

Defendant

Clerk's Office U. S. Dist. Court
AT ABINGDON, VA
F I L E D
APR 21 1987
Joyce F. Witt, Clerk
By: s/s A. Cook
Deputy Clerk
(stamp)

O R D E R

In accordance with a Memorandum Opinion entered this date, these cases are dismissed for lack of subject matter jurisdiction. Accordingly, these causes are stricken from the docket.

The Clerk is directed to send certified copies of this Order to counsel of record.

ENTER: This 21 day of April, 1987.

s/s Glen M. Williams
UNITED STATES DISTRICT JUDGE

A TRUE COPY, TESTE:
Joyce F. Witt, Clerk
By: s/s A. Cook
Deputy Clerk
(stamp)

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 87-1636

MARK L. FORTNEY, et al.,

Appellants,

v.

UNITED STATES OF AMERICA,

Appellee.

MEMORANDUM OF CLARIFICATION CONCERNING WAIVERS OF ARMY SAFETY REGULATIONS

During oral argument of this appeal on January 5, 1988, significant discussion was devoted to whether the use of nonconductive tubs in Building 3507 at Radford violated Army Safety Regulation AMCR 385-100 §20.4. This regulation, which is reproduced in the Joint Appendix at III-848, prescribes in descending order of preference five types of containers in which hazardous materials, specifically including explosive mixtures, may be transported within a plant. Nonconductive rubber containers are not one of the choices. Though this regulation states that containers "should" be made of the listed materials, §1.3(b) provides that deviation from "advisory" regulations using the word "should" are not permitted unless a waiver or "exception" is obtained inwriting. The Government admits that no waiver of §20.4 was ever obtained.

During oral argument the Court questioned whether the approval by the government safety staff of the results of the preoperational survey of Building 3507 constituted a waiver of the obligation to comply with §20.4. This question is conclusively answered by §1.5 of the same manual, which is reproduced in the Joint Appendix at III-786. This section is entitled "Procedure Concerning Waivers of Safety Regulations." It provides, *inter alia*, that:

1. Waivers will be granted "only after it has been determined that compliance with applicable safety standards cannot be effected, and that essential work on critical Army material must still be performed" or that other extenuating circumstances exist;

2. Waivers and exemptions (excuses from compliance with advisory provisions such as §20.4) are granted for "specific situations" and are limited as shown in "the pertinent correspondence;"

3. Waivers are granted only for such a period of time as is necessary to correct the unsafe condition.

In addition, "local waivers" of advisory provisions must be in writing and are granted for specific periods of time. See §1.3 (Sections 1.3, 1.4 & 1.5 are also attached hereto as Exhibit "A").

Appellants believe that §§1.5 and 1.3 clearly demonstrate that the overall approval of the preoperational survey of Building 3507 did not work a waiver of the obligation to comply with §20.4. A waiver plainly is effected only by following the procedures mandated for its obtainment.

Since the Government admits that these procedures were not complied with, no waiver can be found, and it is therefore indisputable that §20.4 was violated. As previously contended, the violation of a safety regulation takes the case outside the discretionary function exception.

Respectfully submitted,

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BY s/s Charles S. Siegel
CHARLES S. SIEGEL

BY s/s Brian D. Weinstein
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Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 8th day of January, 1988, to all counsel of record.

S/s Charles S. Siegel
CHARLES S. SIEGEL

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

NO. 87-1636

MARK L. FORTNEY, et al.,
Appellants,

v.

UNITED STATES OF AMERICA,
Appellee.

MOTION FOR LEAVE TO FILE MEMORANDUM OF CLARIFICATION

COME NOW Appellants in the above matter, pursuant to Internal Operating Procedure 28.3, and file this their Motion for Leave to File Memorandum of Clarification and would show the Court the following:

During oral argument of this appeal on January 5, 1988, a substantial amount of discussion focused on whether the use of nonconductive tubs in Building 3507 violated Army Safety Regulation AMCR 385-100 §20.4. Since nonconductive tubs are not among the permissible choices in §20.4 for intraplant transportation of hazardous materials, the Court inquired as to whether a waiver of the regulation, as contemplated in §1.3, had been secured. It was further suggested that the approval, by the government safety staff, of the preoperational survey of the entire operation may have constituted such a waiver.

Appellants seek leave to file the attached Memorandum of Clarification in order to fully explain the requisites for a waiver. Such an explanation is necessary because the Court was not apprised at oral argument of another section, §1.5, which is entitled "Procedure Concerning Waivers of Safety Regulations." This section will alleviate uncertainty as to the definition of a waiver and whether one was obtained.

At oral argument, the Court devoted considerable discussion to the issue of whether a mandatory regulation removes any policy discretion from a government employee and thereby places his actions outside the discretionary function exception. Since the question of whether §20.4 was violated may be important to the Court's decision in this case, Appellants respectfully request the opportunity to fully clarify the waiver point.

The Memorandum of Clarification is attached hereto.

WHEREFORE, PREMISES CONSIDERED, Appellants pray that their Motion for Leave to File Memorandum of Clarification be granted.

Respectfully submitted,

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BY s/s Charles S. Siegel
CHARLES S. SIEGEL

BY s/s Brian D. Weinstein
BRIAN D. WEINSTEIN

Counsel for Appellants

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 8th day of January, 1988, to all counsel of record.

s/s Charles S. Siegel
CHARLES S. SIEGEL

AMC REGULATION AMCR 385-100

SAFETY

SAFETY MANUAL

HEADQUARTERS, U.S. ARMY
MATERIAL COMMAND

APRIL
1970

HEADQUARTERS
UNITED STATES ARMY MATERIEL COMMAND
WASHINGTON, D. C. 20315

AMC REGULATION
No. 385-100 21 April 1970

SAFETY

SAFETY MANUAL

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This regulation supersedes AMCR 385-224, 4 September 1951, including changes 1 through 16.

CHAPTER 1

INTRODUCTION

1-1. PURPOSE

This regulation prescribes the general safety rules of the U.S. Army Materiel Command (AMC), which are not covered in sufficient detail by national safety codes or standards. Safety rules applicable to special hazardous operations performed at relatively few AMC installations are published in supplemental AMC regulations in the 385 series.

1-2. SCOPE

This regulation applies to Headquarters, AMC; AMC major subordinate commands (including subordinate installations and activities); AMC project/product managers; and separate installations and activities reporting directly to Headquarters, AMC. It prescribes safe methods and practices for safeguarding personnel, insuring continuity of production, and preventing property damage. Codes and safety standards of the National Safety Council, American National Standards Institute, National Fire Protection Association and other nationally recognized organizations will be used in conjunction with these regulations to develop appropriate local standards for safe practices and procedures, personal protective equipment, machine guards, etc. However, when these codes or standards are in conflict with the AMC regulations, the AMC regulations shall apply.

1-3. APPLICATION

a. The mandatory requirements and advisory provisions set forth in this regulation apply to each activity and facility where the Commanding General, AMC is charged with the responsibility for safety.

b. Mandatory requirements are those in which the terms "shall", "will" or "must" are used, and no deviation is permitted without specific written authority in the form of a waiver, exemption or authorization from the Commanding General, AMC, ATTN: Safety Office. The advisory provisions are those in which "may" or "should" are used, and no deviations are permitted unless exceptions (local waivers) are authorized in writing by the commanding officer or his designated agent. Local waivers covering conditions which can be corrected should be granted for definite periods of time (one year or less). Such waivers must be reviewed at least annually to determine whether changed conditions warrant continuation of the waiver. All exemptions, waivers and authorized deviations shall be maintained in a central register which is readily available to authorized personnel.

c. Existing facilities not complying with safety regulations published after their construction or installation may be exempted from the new requirements when such action is authorized by the Commanding General, AMC. However, modifications, unless minor in nature and not decreasing safety, must comply with the latest safety requirements. AMC establishments with facilities exempted from compliance with regulations should take additional precautions to counterbalance the deficiencies.

1-4. RESPONSIBILITY FOR ENFORCEMENT AND COMPLIANCE

a. The Commander of an AMC command, installation, or activity is solely responsible for the safety of his command, and it is important that he take the same active aggressive leadership in safety that he takes in other phases of command responsibility. It is the responsibility of the Commander to insure that all activities are conducted in accordance with the safety rules and regulations set forth herein. Where no existing safety rule or regulation applies to circumstances of major importance or where a deviation from an established mandatory safety regulation is desired, it is the responsibility of the Commander to submit, through command channels, full particulars and detailed plans to the Commanding General, AMC, ATTN: Safety Office, for authorization. In the interim, the Commander shall take the action he deems necessary to control the hazard. The absence of a safety requirement in this regulation or in the references cited does not necessarily indicate that no safeguards are needed.

b. It is also the responsibility of the Commander to require personnel of other agencies, while on an AMC establishment, to comply with the general safety regulations of his establishment and assure that operations and activities of tenant agencies do not endanger personnel and facilities for which he is responsible.

c. The Commander shall enforce the mandatory requirements of this regulation and be guided by the advisory provisions. He shall institute those inspections necessary to effect compliance with the rules and regulations prescribed herein.

1-5. PROCEDURE CONCERNING WAIVERS OF SAFETY REGULATIONS

a. A waiver will be granted only after it has been determined that compliance with applicable safety standards cannot be effected, and that essential work on critical Army material must still be performed, or other extenuating circumstances exist. Waivers and exemptions (paragraph 1-3b) are granted for specific situations and are limited as indicated in the pertinent correspondence, and shall not be interpreted to cover similar operations, locations or conditions. A waiver, when granted, will be issued only for such minimum time as is necessary to correct the unsafe condition. In no case will a waiver be granted initially for a period in excess of one year. Installations and activities which have been granted exemptions or waivers shall initiate action to effect cancellation when the necessity for the exemptions or waivers terminates.

b. Upon local determination that a waiver of mandatory provisions of this regulation is necessary, installations and activities will forward requests through command channels to the Commanding General, AMC, ATTN: Safety Office. Requests forwarded will contain, as a minimum, the following information:

(1) Description of condition (maps showing distances to internal and external exposures, personnel involved, and facilities exposed).

(2) Safety regulations violated.

(3) Statement why compliance with mandatory safety requirements cannot be effected locally ((2) above).

(4) Specific time required for waiver.

(5) Precautions that will be taken to achieve safety in operations during period of waiver.

In case of an extreme emergency, telephone, teletype or telegram request may be made through command channels and confirmed in an official letter forwarded to the Commanding General, AMC, ATTN: Safety Office, within three days of the initial request.

c. Expiring waivers will not be renewed unless there is evidence that all practicable means for complying with approved standards have been exhausted. Waivers shall be considered as rescinded on the stated expiration dates unless requests warranting renewal have been received in Headquarters, AMC, (Safety Office) in ample time (at least 30 days prior to expiration date) to permit evaluation and reply.

1-6. SAFETY ORGANIZATION

Each AMC major subordiante command and class II installation or activity shall institute and maintain a safety organization which functions essentially as shown in figure 1-1.

1-7. SAFETY DIRECTOR

The commander of each AMC major subordinate command and class II installation and activity shall designate an individual who is occupationally qualified as either a safety officer or safety engineer to serve as safety director. This individual shall supervise all safety activities of his command, installation or activity. He shall be a member of the commander's staff and shall be responsible directly to the commander for the establishment, continuing interest in and the success of all phases of the safety program.

1-8. DIRECTORS OR PRODUCTION CHIEFS

Each director or production chief shall be responsible to the commander for the safety of his area. In addition, each shall develop an aggressive attitude toward the promotion of safety activities within his area, shall comply with the requirements of these regulations and take an active part in the overall safety program.

1-9 FOREMEN OR SUPERVISORS

Each foreman or supervisor shall consider the prevention of injuries to employees under his jurisdiction to be as important a phase of his job as quantity and quality of production. To accomplish this, he shall train his men to work safely, supervise them closely, correct unsafe acts and mechanical or physical conditions, enforce safety regulations, investigate accidents and take other action necessary to insure the safety of the employees. The success of a safety program depends upon the ability of the operations foreman or supervisor and his enthusiastic participation in the organized safety effort.

1-10. EMPLOYEES

Each employee, as a condition of employment, shall adhere to all instructions and use the personal protective equipment and protective devices provided. He should develop intelligent and safe working habits by following safe practice rules and regulations in order to protect himself and his fellow workers from injury and to prevent damage to material, equipment, and facilities. He should contribute any suggestions which may assist in the effort to prevent accidents and otherwise take an active part in the safety program.

1-11. CENTRAL SAFETY BOARD

a. A safety board shall be organized at each AMC installation and shall hold meetings regularly, but not less than once each quarter. The board should include the following members:

Commanding officer, chairman
Safety director, secretary
Directors or production chiefs
Facilities engineer (chief engineer)
Senior ammunition inspector
Civilian personnel officer
Fire chief (fire marshal)
Post surgeon (medical officer)
Provost marshall

Others (including representatives of subordinate or tenant activities) as determined by the commanding officer.

AMCR 385-100
1-11(b)

b. The board shall aid in establishing the safety program and determine its adequacy, effectiveness and methods for improvement. To do this, the board shall become familiar with the personal injury and property damage experience of the installation, and the potential hazards that might cause injury; and devise ways and means to eliminate unsafe acts and to correct unsafe mechanical and physical conditions.

c. Minutes of central safety board meetings shall be prepared and copies furnished through command channels to the Commanding General, AMC, ATTN: Safety Office, and to Director, AMC Field Safety Agency.

SAFETY ORGANIZATION FUNCTIONAL CHART

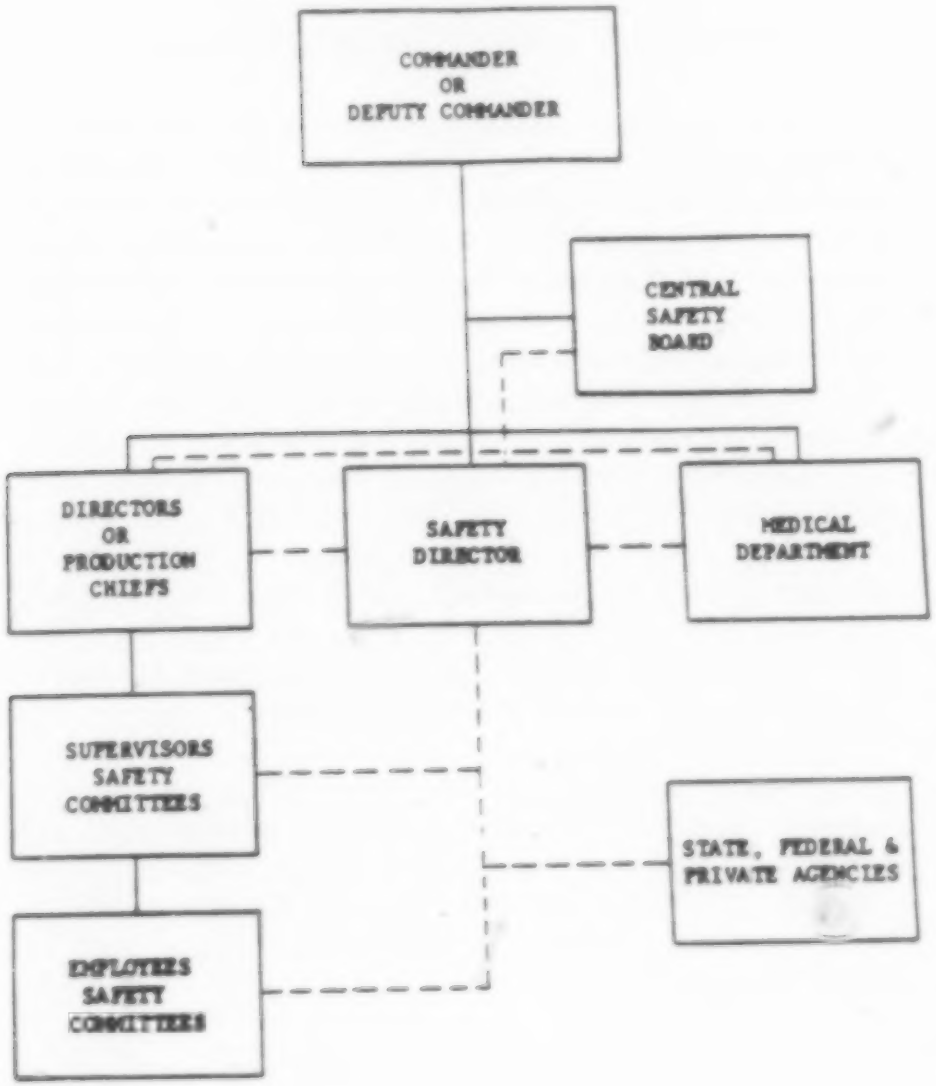


FIGURE 1-1. Safety Organization Functional Chart

1-12. FOREMEN'S SAFETY COMMITTEES

a. One or more foremen's safety committees shall be formed at each AMC installation and shall hold regular meetings at least once each month. Each foreman should be a member of one of these committees, but if the committees consist of only a portion of the supervisors, membership shall be roatated so that each member serves for approximately six months and only a few members are replaced at any one time. Maximum effectiveness is achieved if membership in a committee is limited. A limit of 15 members per committee is recommended. Each committee should have a chairman and a secretary. The safety director or a member of his office should attend each meeting in an advisory capacity. Minutes of committee meetings shall be prepared and forwarded to the installation safety office and to appropriate directors or production chiefs for review and resolution of matters pertaining to safety.

b. Each foremen's safety committee shall take an active part in the safety program of the establishment and particularly shall strive to decrease personal injury possibilities of the employees and property damage under the jurisdiction of the foremen in the group.

1-13. EMPLOYEES' SAFETY COMMITTEES

a. Employees' safety committees should be formed at each AMC installation and should hold regular meetings at least once each month in order that all personnel may participate in the safety program of the establishment. Each committee should consist of not more than 15 employees. Membership on these committees should be rotated so that each member serves for approximately three months and only a few members are replaced at any one time. Each committee should have a chairman and a secretary should be appointed by the committee chairman. The safety director or a member of his staff should attend each meeting in an advisory capacity. Minutes of committee meetings shall be prepared and forewarded to the installation safety office and to appropriate directors or production chiefs for review and resolution of matters pertaining to safety.

b. Each employee safety committee shall take an active part in the safety program of the establishment, and particularly, shall strive to decrease personal injury possibilities and property damage within its own group.

1-14. INTERDEPARTMENTAL COORDINATION

The activities of all departments in an installation shall be coordinated to insure the successful accomplishment of the safety program. Cooperation within departments and between other departments and the safety department should prevail.

1-15. SAFETY PROGRAM

a. To be effective, a safety program must include provisions of maximum safety (consistent with operational requirements) in the design of materiel; prevention of injuries to military, civilian and contractor personnel; prevention of damage to property and interruption of essential operations; and elimination from the environment of those effects of operations which might otherwise endanger the general populace. The program shall have two phases, the general and the specific functions. The general function shall be continuous and repetitive and shall be planned to eliminate the conditions which cause the majority of accidents. The specific functions shall be specialized in character and shall be planned to determine and correct hazards associated with the flow of materials, the method of process, and/or physical plant conditions. At each installation, there shall be only one Safety Program.

b. The object of the general function shall be the elimination of accidents occurring with a significant frequency and assignable to a particular agency, unsafe act, unsafe condition, etc., and of accidents which are concentrated in any

particular area or section of the establishment. This phase of the program shall be broad in scope and shall include:

(1) Safety program management.

(2) Development of safety standards and regulations.

(3) Systems safety engineering.

(4) Safety engineering review of construction, existing facilities and operations.

(5) Safety education and promotion.

(6) Safety training.

(7) Investigation, analysis and reporting of accidents and incidents.

(8) Safety inspections.

c. The nature of the specific function requires the making of inspections and accident cause investigations pertaining to special studies and analyses of handling operations, process operations, materiel failures, physical conditions of a plant or area, the use of toxic materials, and of other specific operations. The safety office shall participate in materiel design, development of precess plans, development of new construction and facility modification plans and development of equipment specifications.

1-16. HAZARD CONTROL

a. The safety organization shall review all regular operations and all seasonal or special operations such as tank cleaning, boiler cleaning, window cleaning, and infrequent materials handling jobs. Hazards may be determined through accident cause analyses and analyses of all operations, including seasonal or infrequent operations in the establishment.

b. Once the hazards of a particular operation have been identified, they shall be evaluated in order to facilitate correction. The specific preventive or control measures to be applied shall be determined by the characteristics peculiar to the hazard. The solution may be found in education of personel, in use of protective equipment, or in engineering changes involving equipment or processes. The lack of existing regulations or standards does not relieve the Commander of responsibility for developing local measures for the control of recognized hazards.

c. Upon completion of the study of each hazard and the determination of corrective measures, all data should be assembled and a repo.t prepared for the approval of the superintendent, production chief, safety board, or Commander, as may be required. Upon approval, the correction shall be effected and continuing protection assured through follow-up corrective measures by supervisory personnel and through inspections by the safety department.

1-17. EDUCATIONAL PROGRAM

An educational program shall be instituted in each establishment to develop and maintain employees' interest in the safety program, and to train employees in safe practices and safe procedures. The safety director shall determine the need and arrange for the procurement and selective distribution of safety promotional and educational materials. Available media for employee education include posters, bulletin boards, scoreboards, special exhibits, "No accident" campaigns, safety or clean-up contests, articles in establishment publications, safety rules hand-out cards, pamphlets, warning signs for specific hazards, suggestion systems, essay contests, and sound slide films or motion pictures for groups of employees. Appropriate "off-the-job" accident prevention features shall be included in the program, and the safety organization should stimulate the interest of and cooperate with outside agencies concerned with this phase of the accident prevention program.

1-18. EMPLOYEE TRAINING

a. The personnel department or other departments charged with the responsibility for preparing the written employee training program shall collaborate with the safety director to assure adequate treatment of accident prevention matters. Comprehensive and thorough job safety training results in increased production through reduced susceptibility to mistakes and accidents. It is the responsibility of the training department to assist all departments in determining training needs, and to provide courses to meet these needs.

b. All new employees must be made aware of installation general safety rules and regulations before being placed on the job. This should be accomplished through an orientation course. Each employee shall be trained for the specific job to which he is assigned. This training may be accomplished by the supervisor on the job, by special instructors or by experienced workers through the apprenticeship method. The employee shall be thoroughly instructed in the efficient safe method of performing his assigned work before being permitted to work "on his own". The personal benefits accruing to the employee by conformity with these rules should be explained.

c. The instructors shall be properly trained in the use of sound instructional methods and in determining what knowledge must be passed along to the worker. The instructions concerning the performance of new duties should be well planned in advance so that the instructor can present them in an orderly and complete fashion. The use of a written job procedure (job breakdown) based on complete analysis of the job has been established as a valuable method for this purpose. Such analysis should include an outline of the necessary steps in the performance of the job, a listing of the essential techniques for the efficient performance of each step, a listing of the hazards present in each step, and definite, positive instructions regarding each hazard which will enable the worker to avoid accidents or injury.

d. To insure receiving the maximum benefits from any training, supervision shall maintain a continuous program of follow-up, reinstruction, and enforcement of regulations and procedures with each employee.

1-19. FIRST-AID TRAINING

First-aid training shall be made available during duty hours. Electricians, maintenance men, guards, firemen and foremen, attendants and orderlies in the first-aid room, and other job categories selected by the installation safety director as having a job-related need for this training shall take the course. Insofar as practicable, the first-aid training course should be made available to all employees. The content of the training course and the number of hours of class attendance will be determined by the commanding officer to fit local needs based on advice from the Surgeon. Instructors will be qualified and accredited. A certificate should be awarded to each person completing the course satisfactorily. A refresher course should be given at intervals, but it is more important to give first-aid training to those who have not been trained.

1-20. INJURY REPORTS

A complete and accurate system of accident records constitutes the focal point of a safety program. Accident records must be used, and used effectively, to obtain the best results in any accident prevention program. In order that effective accident cause analyses can be made, accident records will include data which will:

a. Indicate the accident trend;

b. Identify departments with the poorer records;

c. Reveal hazardous agencies, conditions, practices, and processes requiring correction or protection;

d. Point to predominant types of accidents;

e. Indicate employees who require special attention and/or training;

f. Reveal the lack of enforcement of established regulations; and

g. Indicate the need for additional safety standards.

1-21. ACCIDENT PREVENTION INSPECTIONS

Safety personnel shall inspect each operation for unsafe work practices and unsafe physical and mechanical conditions at least once each month. Hazardous operations or accident experience will indicate the advisability of more frequent inspections. The safety director shall arrange for prompt inspections of any seasonal or unusual work of a hazardous nature. Operations foremen shall make daily inspections of work areas and operating conditions to assure that all hazards have been minimized and that safe work practices are being employed. The operations foreman should accompany the assigned safety inspector whenever possible. All of the discrepancies noted, and recommendations to be made, by the safety inspector, should be brought to the operating foreman's attention during or immediately after the inspection so that unsafe acts and unsafe conditions may be corrected promptly. Accident prevention inspections shall be systematic and thorough so that no location will be overlooked.

1-22. ACCIDENT INVESTIGATION

Accidents shall be investigated in accordance with current directives to determine all contributing causes and the preventive measures which will eliminate or reduce the number of accidents. Even accidents which do not cause severe property damage or injury to personnel must be investigated so that preventive measures can be taken before the same or a similar set of circumstances result in a serious accident. The investigation of first aid cases must not be overlooked, however slight the injury may be, and an effective system for the prompt reporting of first-aid cases to the safety department must be instituted. The operations foreman shall be required to investigate, with the help of his supervisor or a safety office representative if necessary, all accidents involving operations, equipment, or personnel under his supervision, and his report shall be forwarded for appropriate action. The safety director shall be responsible for the arrangements necessary to receive immediate notices of all disabling injuries. When an accident occurs, immediate action shall be taken by the safety director to:

a. Interview the injured person before he is sent home or to the hospital when delay of treatment will not jeopardize the injured;

b. Visit the scene of the accident to observe conditions as they were or might have been at the time of the accident;

c. Obtain details of the injury from the medical department;

d. Prepare or obtain photographs, diagrams, sketches, and maps as warranted by the circumstances;

e. Confer with foremen, supervisors and witnesses for information as to cause;

f. Examine safety, medical, and personnel department records on the injured person's previous history, physical conditions and individual accident experience;

g. Plan corrective measures with the foreman and other interested parties;

h. Complete the necessary accident reports;

i. Establish a follow-up on the application of recommended corrective measures;

j. Follow through for exact information pertaining to the return of the injured to work.

1-23. ACCIDENT CAUSE ANALYSIS

Accident reports shall be used to compile accident data, preferably on a monthly basis, for dissemination to operating segments. The record shall show the accident factors (agencies, unsafe conditions, types of accidents and unsafe acts) subdivided into appropriate group classifications. Further

analysis should be made of each factor to determine exactly what has happened. Analyses should be used in developing:

a. The education program,

b. Employee motivation,

c. Contests and "no accident" campaigns,

d. Safety meeting topics,

e. Process changes, and

f. Facilities and equipment modification.

1-24. OFF-THE-JOB SAFETY

Avoiding off-the-job accidents is fully as important to the employee, his family, and to the production of materials necessary to the welfare of the nation, as is being a safe worker at the establishment. Management should cooperate with civic organizations in efforts to make employees and their families aware of that fact. This can be accomplished through several media. Periodically, bulletin boards at the establishment should be used to promote off-the-job safety. At reasonable intervals, employees should be furnished with cards, payroll inserts, booklets, etc., devoted to such topics as pedestrian safety, safe driving, fire prevention, home safety, recreational safety and first aid. Management should consider other possibilities to stimulate interest in off-the-job safety such as analysis of after-work accidents based on absentee records and the development of defensive skill in driving—teaching employees to avoid accidents that may arise due to the unsafe driving of others. Local conditions determine the roles of the installations in community safety.

CHAPTER 7

STATIC ELECTRICITY

7-1. GENERAL

a. The generation of static electricity is not of itself a hazard. The hazard arises when static is allowed to accumulate, for subsequently it may discharge as a spark across an air gap in the presence of highly flammable material, and thus provide a source of ignition.

b. Detailed discussions of the hazard of static and ways of reducing it are contained in the following publications:

(1) "Static Electricity," published by the National Fire Protection Association as NFPA Standard No. 77M.

(2) "Static Electricity," Bulletin No. C438, United States Department of Commerce.

(3) "Static Electricity in Nature and Industry," Bulletin No. 368, United States Department of Commerce.

(4) "Standards for Grounding and Bonding Equipment," published by Underwriters' Laboratories, Incorporated.

7-2. GROUNDING OF EQUIPMENT

The general method employed for eliminating or reducing the hazard from static is to provide electrically continuous paths to ground to allow the charges to dissipate as fast as they are generated. When all the objects concerned are conductive, grounding can be readily accomplished by electrically connecting all parts to a common ground conductor. Grounding exterior parts of containers alone does not necessarily eliminate all of the danger from static electricity for in order to be completely effective, grounding must include the contents, which is not always practicable; e.g., ungraphited solid propellants in metal containers. Partial grounding or using conductors of insufficient strength or too high resistance may increase the static hazard by providing other opportunities for discharge through an uncontrolled path to ground. Electrical continuity may be broken by oil on bearings, paint or rust at any contact point. In order to obtain a continuous circuit, bonding straps should be used to bridge such locations. Permanent equipment in contact with conductive floors or table tops is not considered to be adequately grounded. Static grounds shall not be made to gas, steam, or air lines; dry pipe sprinkler systems or air terminals of lightning protection systems. Static grounds can be made to water pipes, ground cones, buried copper plates or driven ground rods, which may or may not be part of the lightning protection system or to down conductors of lightning protection systems. Wires used as static ground conductors should be at least size No. 8 or No. 10 AWG as specified by NFPA Standard No 77M.

7-3. BELTS

Conductive belting shall be used in locations where static is a hazard. Such belting shall have a resistance to ground not exceeding 600,000ohms. Static combs must not be used to drain off static generated from belting or pulleys used in locations where hazardous concentrations of explosives dust or flammable vapors are present.

7-4. TESTING EQUIPMENT GROUNDS

Grounding systems shall be tested for electrical resistance and continuity when completed and in the case of active equipment, prior to operation and at specified intervals, to be determined locally, thereafter. All exposed explosive or hazardous materials shall be removed prior to making tests. Complete record of all tests shall be kept. In testing for resistance to ground, equipment should be considered as a unit except in the case of a belt-driven machine. In measuring the total resistance to ground for belt-driven machinery to assure compliance with paragraph a below, resistance of the belting is to be excluded. The maximum resistance to ground permitted for different types of equipment is as follows:

a. *Hazardous locations (operations where a static spark discharge may be dangerous).* All conductive parts of equipment shall be grounded so that resistance does not exceed 25 ohms, unless 10 ohms is required for lightning protection as specified in Chapter 8. For existing equipment, the rate of static generation should be considered before changes in grounding systems are made. The resistance of conductive rubber hose should not exceed 250,000 ohms.

b. *Nonhazardous locations.* Nonelectrical equipment in nonhazardous locations need not be grounded unless grounded for static dissipation, but should be grounded as a part of the lightning protection system when such system is installed. For interconnection of metallic masses, the standards set forth in "Lightning Protection Codes," NFPA Standard No. 78 apply.

7-5. CONDUCTIVE FLOORS

a. Conductive floors and conductive shoes shall be used for grounding personnel at operations where explosives such as primer, initiator, detonator, igniter, tracer and incendiary mixtures are exposed. Some materials sensitive to static sparks (easily ignited or detonated) are lead styphnate, lead azide, mercury fulminate, tetrazene, diazodinitrophenol, potassium chlorate-lead styphnate mixtures, igniter composition, grade B magnesium powder, and black powder dust when exposed in layers. Dust of solid propellants can also be ignited from the spark energy that can be accumulated on a person and conductive floors and shoes must be employed when the dust is present. In addition, dust-air mixtures of ammonium picrate, tetryl, tetrytol, and dust of solid propellants are sensitive to static electricity discharge. Many flammable liquids and air mixtures tested (ethyl ether, ethyl alcohol, ethyl acetate, acetone, and gasoline) can be ignited by static discharge from a person. When personnel come into the proximity of (possible contact with) explosives or mixtures enumerated above, conductive floors shall be installed except where the hazards of dust-air or flammable vapor-air mixtures are eliminated by adequate housekeeping, dust collection, ventilation, or solvent recovery methods.

b. Conductive floors also are required where operations are performed involving:

(1) Loose unpacked ammunition with electric primers.

(2) Exposed electro-explosive devices; e.g., squibs, detonators, etc.

(3) Electrically initiated items with exposed electric circuity; e.g., rockets.

(4) Hazardous materials that could be ignited by a static discharge from the human body.

c. Conductive floors and footwear are not required throughout an entire building or room if the hazard remains localized. In such cases, conductive mats or runners may be used where required.

d. Personel, except electricians, in locations where conductive floors are required and installed shall wear conductive foot-wear (see paragraphs 10-11 and 16-18g). Electricians are not to work in a building or room containing exposed explosives. They must wear nonconductive shoes for electrical work. In addition, when observing explosives operations to check on performance of equipment, they shall be provided with conductive booties or other grounding device.

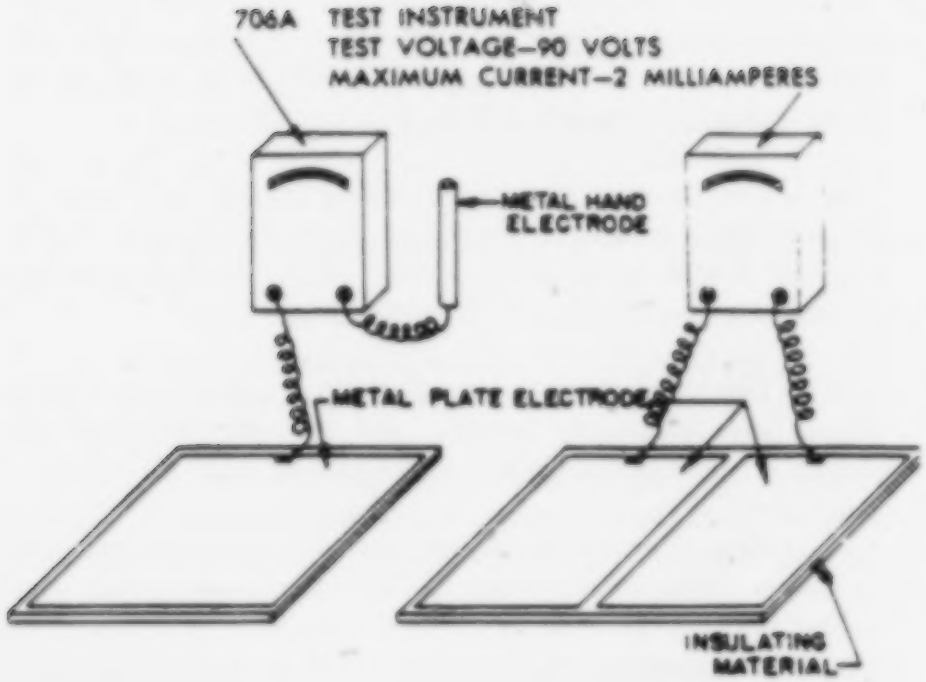
7-6. CONDUCTIVE FLOOR SPECIFICATIONS

Conductive floors must be of nonsparking material such as lead, conductive rubber or conductive flooring composition and shall meet the following requirements in addition to those goven in paragraph 5-3.

a. The flooring and its grounding system must provide for electrical resistance measured between ground and a 5-pound electrode in direct contact with five square inches of floor arez not to exceed 250,000 ohms.

b. The surface of the installed floor must be free from cracks and reasonably smooth, and the material must not slough off, wrinkle or buckle under operating conditions.

c. Where conductive floors and shoes are required, the resistance between the ground and the wearer shall not exceed 1,000,000 ohms; i.e., total resistance of conductive shoes on a person, plus the resistance of floor to ground. Where conductive floors and shoes are required, table tops upon which exposed explosives or dusts are encountered should be covered with a properly grounded conductive material meeting the same requirements as those for flooring. See Figures 7-1 and 7-2.

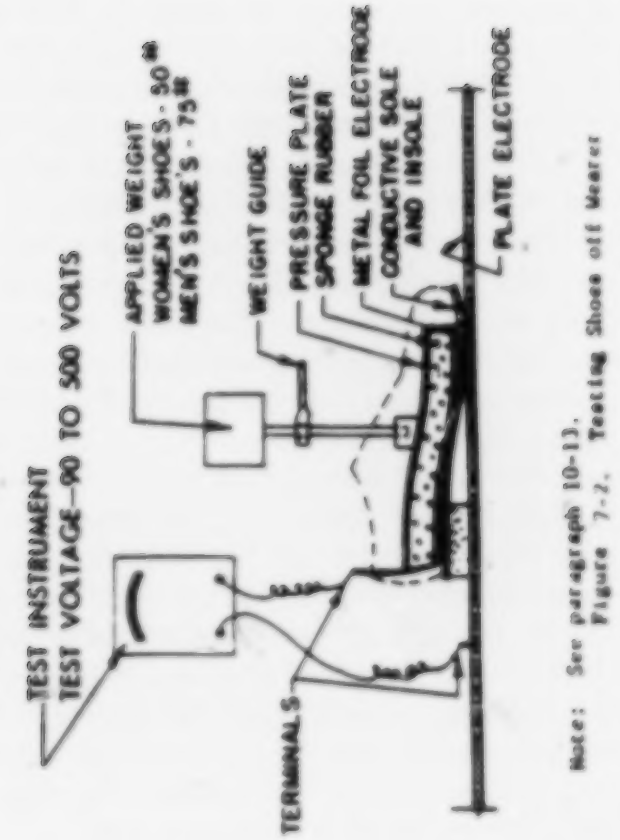


SHOES IN PARALLEL CONNECTION
250,000 OHMS

SHOES IN SERIES CONNECTION
1,000,000 OHMS

Note: See paragraph 10-13.

Figure 7-1. Testing Shoes on Wearer.



Note: See paragraph 10-13.
Figure 7-2. Testing Shoes off Wearer

7-7. CONDUCTIVE FLOOR TESTS

a. Initial tests shall be made of all conductive floors and subsequent tests shall be made at least semiannually. The test results shall be permanently recorded with a copy filed in the Safety Office. Instruments used in making tests shall be used only when the room is free from exposed explosives. The instrument used should be portable, self-powered, enclosed unit and should consist of two dry electrodes. One electrode shall consist of a special metal block (five pounds in weight) which makes contact with five square inches of floor area. The block should be equipped with a nonmetallic strap to enable pulling it along the surface of the floor under test. If the flooring is uneven, making it difficult to obtain five squre inches of contact, a thin coating of "electrode jelly" (brushless shaving soaps) may be applied to the underside of the block. The other electrode should consist of a suitable spring test clip for attachment to a permanent ground. The electrodes shall be insulated from each other and should be connected with instruments by test leads of such length that all parts of the floor can be reached, and connected in such a manner that the resistance between electrodes may be measured as shown in Figure 7-3. The operation and maintenance of test instruments shall be entrusted to competent personnel.

b. The voltage applied to the instrument should be between 90 and 500 volts. Low voltage instruments may be used, but if the floor shows more than the maximum permitted resistance with instruments of less than 500 volts, a test with a 500-volt instrument should be made before any action is taken to gain greater conductance. If the resistance is then greater than 250,000 ohms, and the floor and electrodes

are free from insulating materials, the effectiveness of the floor grounds shall be tested.

7-8. HUMIDIFICATION

Humidification for preventing static electricity accumulations and subsequent discharges is usually effective if the relative humity is above 60 per cent. However, certain materials such as metallic powders and some of the pyrotechnic mixtures cannot be exposed to air with 60 per cent relative humidy because of the possibility of spontaneous ignition.

7-9. IONIZATION

Ionization is electrical neutralization and serves as an effective method of removing static charges from certain processes and/or operations. Methods of application can be found in NFPA Standard 77M, "Static Electricity." Ionization methods of removing static charges must not be used in hazardous locations as defined in the National Electrical Code and Chapter 6 of this regulation.

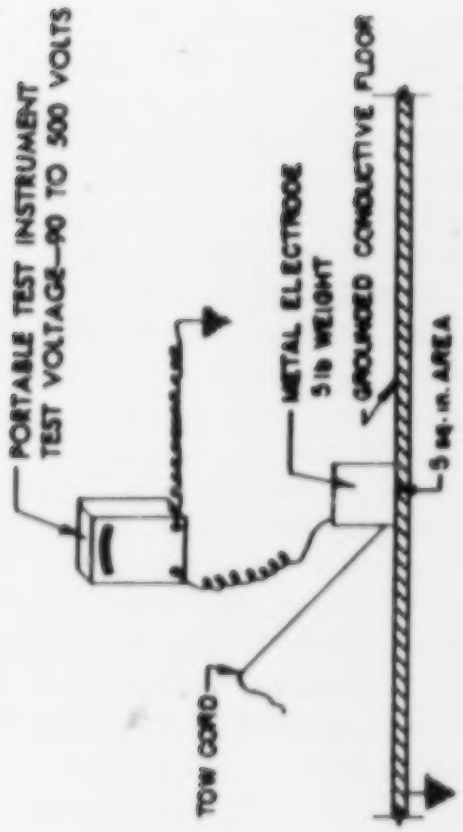


Figure 7-3. Testing Grounded Conductive Floors.

7-8

c. Valves controlling active sprinkler systems and under-ground sections shall be sealed in the open position. Post indicator stems shall be drilled for insertion of sealing wire so that valves can be spring tested without breaking the seal.

12-32 CLEARANCE UNDER SPRINKLERS

A minimum clearance of 18 inches will be maintained between sprinkler deflectors and stored nonhazardous materials that are piled 15 feet high or less, and a minimum clearance of 36 inches will be maintained between sprinkler deflectors and stored nonhazardous materials that are piled higher than 15 feet. Regardless of the height of storage, a minimum clearance of 36 inches will be maintained between sprinklers and storage in extra hazard occupancies and between sprinklers and baled storage.

12-33 DELUGE SYSTEMS

a. In addition to sprinklers, deluge systems should be provided for the protection of operating personnel in high hazard occupancies. Powder cutters, cotton pickers, melt units, mix-melt kettles, equipment containing reservoirs of molten explosive and other locations where a process fire hazard exists shall be protected by properly designed deluge systems. Rate-of-rise, light-acuating or other quick-action devices for automatic control of deluge systems are recommended. Such automatic controls should be backed up by quick-acting manual controls.

b. The distributing outlets (nozzles, sprays, heads, etc.) should be located as close to the exposed surface of the explosive as possible, consistent with the outlet discharge pattern, to insure immediate drenching of all parts of the machine under extreme conditions. When explosives are located inside of machines, under tight hoods or covers, distributing outlets should be located inside the enclosed space. For example, on the volumetric loading machine:

(1) Outlets should be placed inside of the enclosed reservoir over TNT.

(2) Outlets should be placed inside of the machine over the measuring cups.

(3) Consideration should be given to providing outlets located so that the top of the heating unit and the tops of shell in the skid under the machine will be drenched in case of fire.

c. Where explosive vapors, gases or dusts may enter outlets and interfere with their operation, nonmetallic internally spring-held caps should be placed on the outlets. The design must provide immediate release of the cap upon exertion of pressure within the outlet. Caps should be attached to outlets with small nonferrous chains to prevent their loss in equipment upon actuation of the deluge system.

d. Required water flow and pressure should be determined for the hazard. Where possible, and where no applicable data exists, experimental fire extinguishment should be made in a safe outdoor location.

e. Deluge systems should be flow tested periodically to insure that they are in proper operating condition. Records of tests should be kept on file at the fire department.

f. The deluge valve shall be arranged for automatic and/or manual actuation.

g. Certain hazardous operations such as nitrocellulose dehydration should be protected with a deluge capable of supplying water on the hazard within 50 milliseconds after ignation. Pipe lengths between deluge valves and outlets, and distance between outlets and the protected areas should be kept short to speed application of water.

h. NFPA Standards No. 13 and No. 15 contain basic installation rules.

12-34. FIRE EXIT DRILLS

a. Fire exit drills should be held not less than semi-annually with due consideration given the size of building and number of occupants. If emergency exits other than the usual doors or stairways are provided, it is important for employees to be drilled in their use so that they will go to them automatically in case of fire or other emergency. Organization among the employees for fire drills is essential. The Building Exits Code, NFPA Standard No. 101, should be used as a guide.

b. To facilitate the prompt evacuation of all personnel from buildings, an alarm system which is audible or visible, or a combination of both, should be installed in each explosives operating building. The alarm system for operating buildings containing * * *

CHAPTER 20

PREPARING EXPLOSIVES AND AMMUNITION FOR SHIPMENT

20-1. GENERAL REGULATIONS, COMPLIANCE WITH DEPARTMENT OF TRANSPORTATION REGULATIONS

a. The general regulations governing the marking, packing and shipping of military supplies are set forth in applicable current Army regulation. These operations also will comply with Department of Transportation regulations. This Section, Section 21 and Chapter 22, contain additional regulations applying to the marking, packing and shipping of explosives and ammunition. No live ammunition or ammunition component that has been subjected to undue or abnormal forces for test purposes shall be offered for surface shipment by commercial carrier or be transported over public transportation systems by Government conveyance except:

(1) Items containing small quantities of explosives and constructed of packaged so that their explosions forces will be self-contained if they function.

(2) Ammunition containing high explosives filler but without fuzes or initiating devices.

(3) Explosives items which both the testing agency and the project manager or appropriate commodity command agree can be safely transported. If the normal sensitivity or the item is known or suspected to have been increased, shipment will be by Government conveyance only. In such instances, special attention will be given to dispatch, routing and the need for escort.

b. When items covered by paragraphs 20-1a(1) and (2) above are shipped by commercial carrier, the vehicle involved will be used exclusively for this purpose and will be routed directly to the consignee.

20-1. MARKING

a. Whenever explosives or ammunition containers or ammunition and ammunition components are repainted, the new painting or marking shall correctly identify contents of items. The marking of empty or inert loaded ammunition items for display purposes is governed by the provisions of AR 385-65.

b. Explosives, ammunition, and loaded ammunition components obtained from salvage operations, and material which has lost its identification markings shall be clearly marked to show the explosive nature of the material. Explosive material or items which cannot be definitely identified as to their explosive nature should be disposed of by technically trained personnel in accordance with paragraph 27-8a.

20-3. TEMPORARY STORAGE IN SHIPPING AND RECEIVING BUILDINGS

a. *LCL Buildings.*

(1) In buildings specifically designated and used as packing and shipping buildings, ammunition and explosives may, subject to the following limitations, be stored in accordance with the Loading and Storage Chart of Explosives and Other Dangerous Articles as contained in the Department of

Transportation regulations. Incoming shipments should not be allowed to accumulate and should be distributed as soon as practicable after receipt. Items for outgoing shipments should not be accumulated prior to receipt of orders covering each specific shipment.

(2) Separate rooms shall be provided for the temporary storage of ammunition and explosives awaiting shipment, and for their preparation for shipment before assembling, crating, marking, etc. The rooms shall be separated from each other by substantial dividing walls and shall be separated from offices or rooms in which inert operations such as the preparation of stencils, packing and crating are performed. The substantial dividing walls will be constructed to comply with the requirements for fire walls also.

b. *At shipping and receiving buildings.* Where material is stored in accordance with the DOT requirements, not more than three cars of ammunition or explosives shall be permitted at such a building. When materials in the cars, buildings or on platforms are stored in accordance with the Storage Compatibility Groups of this regulation (Chapter 19), a larger number of cars may be located at such places. The combined total amount of explosives in the cars, buildings and platforms must be used as the controlling quantity for determining distance requirements to other targets (see paragraph 17-8). If there is an adequate barricade between the cars and the adjoining building or platform, the quantity on each side of the barricade may be considered individually to determine quantity-distance requirements.

20-4. CONTAINERS

Hazardous materials in bulk or liquid form must be transported in containers which will prevent leakage. Containers used in intraplant transportation and service storage of explosives and explosive mixtures such as initiating explosives, pyrotechnic compositions and tracer materials should be made of material in the following preference order:

Conductive rubber

Nonferrous metal-lined boxes without seams or rivet heads under which explosive dust can accumulate

Plastics (conductive-type only)

Paper-lined wood boxes

Fiber containers.

Fiber containers should not be used when they show signs of damage or wear. Glass containers should not be used because of their fragility and severe missile hazard.

20-5. BLACK POWDER CONTAINERS

a. Standard containers for black powder are built in accordance with drawings that meet DOT specifications.

b. Whe black powder is shipped or received, each container shall be inspected for holes and weak spots, particularly holes made by small nails and which are visible only upon close examination. Damaged containers must not be repaired; the contents shall be transferred to new or serviceable containers.

c. Empty black powder containers may be reused, and may be transported empty provided each container is clean. Empty metal containers which are not to be reused and will be salvaged shall be thoroughly washed inside with water.

d. Black powder containers must be carefully opened. When it is necessary to open containers by puncturing, the operation will be conducted by remote control.

20-6. CONTAINERS FOR SOLID PROPELLANTS

a. Solid propellants shall be packed in accordance with approved AMC drawings that comply with DOT regulations.

b. Double base solid propellants, single perforated solid propellants and all solid propellants with web thickness not greater than 0.019 inch should not be packed in all-steel boxes. Metal lined wooden boxes should be used.

c. Salvaged or deteriorated solid propellants should be shipped water wet.

20-7. CONTAINERS FOR AMMUNITION AND BULK HIGH EXPLOSIVES

a. Ammunition and bulk high explosives shall be packed in accordance with approved AMC drawings that comply with DOT regulations.

b. Containers used for packing bulk high explosives should be lined with strong cloth or paper bags, or liners with cemented seams to prevent sifting.

20-8. HANDLING

a. *Explosives or ammunition*. Packaged ammunition or bulk explosives shall not be handled roughly, thrown about, tumbled, dropped or walked over other explosives or ammunition.

b. *Propelling charges*. Rough handling may open seams in the containers or loosen the covers. The contents of damaged containers shall be examined carefully by qualified personnel for moisture, signs of deterioration or foreign material before repacking. Propelling charges must not be exposed to the direct rays of the sun. If igniter pads on propelling charges are broken, the charges should be handled using the safety precautions prescribed for black powder.

c. *Fuzes, primers, boosters and detonators*. All loaded components must be handled with special care, as these are extremely sensitive to shock and friction.

d. *Other loaded items*. Suitable plugs or closures shall be used to protect exposed explosives in items during transfer within the installaton, such as transfer of projectile from defuzing or deboostering building to the explosives washout building or to the burning or demolition ground.

e. *Use of conveyors, chutes and fork lift trucks* (see Chapter 24). When the precautions noted in subparagraph a above are observed, and the provisions of paragraphs 24-3 and 24-4 are satisfied, explosives, ammunition and bombs packaged in accordance with AMC approved drawings may be handled on power and roller conveyors, chutes or fork lift trucks. Loaded ammunition items should not be

left on conveyors during non-operating periods. Hard-toe sparkproof safety shoes are recommended in areas where projectiles or bombs are handled manually.

f. *Spotting charges*. Spotting charges for practice bombs filled with black powder shall be stored, handled and shipped under the regulations for black powder.

g. Tampering with ammunition by unauthorized personnel is prohibited.

OPPOSITION

BRIEF

Supreme Court, U.S.
FILED
JUL 25 1988
JOSEPH F. SPANIOL, JR.
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No. 87-1929 (2)

In the Supreme Court of the United States

OCTOBER TERM, 1988

MARK LYNN FORTNEY, ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioners contend that the courts below erred in dismissing their complaint as barred by the discretionary function exception to the Federal Torts Claims Act (FTCA), 28 U.S.C. 2680(a).

1. Petitioners are former employees of Hercules, Inc., who were severely burned in an explosion at the Radford Army Ammunition Plant (RAAP). RAAP is an Army-owned facility in Radford, Virigina, which is operated by Hercules under a government contract (Pet. App. 3A). While the Army has the right to inspect the premises, Hercules is primarily responsible for safety at the plant, including the safety of Hercules personnel (*id.* at 3A, 8A).

Hercules manufactures explosives at RAAP that contain dehydrated nitrocellulose. In December, 1980, Hercules began experimenting with a new, automated system for dehydrating nitrocellulose. On May 6, 1981,

this experimental system exploded, causing the injuries that are the basis for this lawsuit. Pet. App. 8A.

Petitioners each brought suit against the United States under the FTCA, claiming that the government "had failed to use reasonable procedures to assure that Hercules utilized necessary safety precautions in its performance of hazardous work" (Pet. App. 8A). More specifically, petitioners alleged (see Pet. 8) that the explosion was caused by the use of a nitrocellulose container made out of nonconductive rubber. Petitioners claimed that Section 20.4 of a *U.S. Army Safety Manual,* AMCR 385-100 (*reprinted at* Pet. App. 30A, 71A) forbade the use of nonconductive containers for hazardous materials. Petitioners also contended (see Pet. 9) that Hercules' sprinkler system was inadequate and in violation of Section 12.33(g) of that same *Manual* (Pet. App. 67A).

2. Following a bench trial, the district court (Pet. App. 8A-13A) dismissed the consolidated cases, concluding that they were barred by the discretionary function exception to the FTCA, 28 U.S.C. 2680(a). The court noted (Pet. App. 12A) that the contracts between the government and Hercules "delegate primary responsibility for safety to the independent contractor with the government's retaining the right to review safety procedures." The court further noted (*id.* at 10A (quoting *United States v. S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines),* 467 U.S. 797, 819-820 (1984)), that " '[w]hen an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind.' " The court accordingly concluded (Pet. App. 12A) that the government's "delegation of safety responsibility" to Hercules was "the type of policy-making for which the [discretionary function exception] was designed."

Petitioners moved for reconsideration in the trial court, arguing, inter alia, that Section 20.4 of the *Army Safety Manual* was a "mandatory" regulation and that the government had no discretion to permit Hercules to violate that regulation by using nonconductive tubs in the dehydration process. The district court denied the motion on two grounds. First, the court noted (Pet. App. 19A) that the regulation in question did not mandate the use of conductive tubs but instead "clearly * * * contemplated situations in which nonconductive tubs would be used." Second, the court noted (*id.* at 19A-20A) that "the government's failure to object to nonconductive tubs * * * reflected many factors and typifies a decision that the [discretionary function exception] was designed to protect."

The court of appeals affirmed in a brief per curiam opinion, holding (Pet. App. 4A) that "on the record in the case at bar, the delegation of safety responsibility to Hercules left the Army with solely discretionary safety functions to perform at the Radford plant." The court rejected (*id.* at 4A n.1) petitioners' contention "that the government was not entitled to discretionary function immunity in this case because the explosion was traceable in part to a violation of a mandatory safety regulation governing permissible containers for hazardous materials." The court agreed with the district court that the regulation in question in fact "embraced the type of container used at the Radford plant, even though the containers used were not specified in the regulation" (*ibid.*). The court stated, in addition, that "violation of a mandatory regulation does not abrogate the government's tort immunity independently of the FTCA, and that the discretionary function exception to the FTCA protects the government from liability 'whether or not the discretion involved be abused.' " *Ibid.* (quoting 28 U.S.C. 2680(a)).

3. a. As both the district court (Pet. App. 8A) and the court of appeals (*id.* at 3A) noted, the government's contracts with Hercules expressly delegated to the contractor the obligation to provide for the safety of its employees and to follow any relevant safety regulations. See C.A. App. 1072. The government retained only a right, not an obligation, to inspect the premises for quality control, security, and safety (Pet. App. 3A, 8A).[1] This case is therefore controlled by *Varig Airlines,* in which the Court held that the government's decision to place primary responsibility for safety on manufacturers, while retaining the right merely to spot-check compliance, was a discretionary decision protected by the discretionary function exception. "When an agency determines the extent to which it will supervise the safety procedures of private individuals, it is exercising discretionary regulatory authority of the most basic kind" (467 U.S. at 819-820).

Petitioners attempt to avoid the binding effect of *Varig Airlines* by arguing that this case is instead controlled by the Court's recent decision in *Berkovitz* v. *United States,* No. 87-498 (June 13, 1988).[2] In *Berkovitz,* the Court in-

[1] The portion of the contract that reserves a right to inspect the premises for safety specifically states that "[n]either the requirements of this clause nor any act or failure to act by the Government in surveillance or enforcement thereof shall affect or relieve the Contractor of responsibility for the safety of his personnel and his property and for the safety of the general public in connection with the performance of this contract, or impose or add to any liability of the Government for such safety." C.A. App. 1072.

[2] In *Berkovitz,* a vaccine recipient contracted polio from an oral poliovirus vaccine. He and his parents sued the government claiming that the FDA licensed the vaccine and approved release of the specific lot of vaccine from which the boy received his dose in violation of federal regulations. This Court rejected the government's contention that the discretionary function exception precluded the suit, holding

dicated (slip op. 15) that if the government exercises its option to inspect private compliance with government safety regulations, government inspectors have no discretion to "knowingly approve[]" violations of those regulations. More generally, the Court stated (*ibid.*) that the discretionary function exception "does not apply if the acts complained of do not involve the permissible exercise of discretion." In this case, however, while two Army employees, along with a number of employees of Hercules, did participate in a "pre-operational survey" of the automated dehydration system (see C.A. App. 778-781),[3] there is no indication in the record that they specifically examined or approved the tubs or the sprinkler system used by Hercules in its experimental dehydration process. Neither the tubs nor the sprinkler system are discussed in the report of that survey (*ibid.*), nor do any regulations specifically require that they be examined or approved by the Army. Thus, the government cannot be faulted for any violation of its own regulations, but at most for failure to uncover certain alleged violations of government regulations during its optional inspection. As *Varig Airlines* makes clear (467 U.S. at 820), however, "the [Army's]

(slip op. 4) that "the discretionary function exception will not apply when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow."

[3] Army Regulations specifically require a pre-operational survey, "consist[ing] of two consecutive stages: a dry run with inert material, a live run with hazardous material." ARRCOM Supplement 1 to AR 385-10 (C.A. App. 1077). The regulations state that '[a]ll or a portion of the pre-operational survey may be delegated to the installation staff" (*ibid.*). In the instant case, however, two Army safety inspectors were present during the pre-operational survey (*id.* at 612-613). Prior to the pre-operational survey, Hercules also prepared and submitted to the Army a lengthy "hazard analysis" of the proposed system. See *id.* at 970-1053. The modifications called for in that report were made by Hercules prior to the pre-operational survey (*id.* at 777).

alleged negligence in failing to check certain specific items in the course of its [compliance review] falls squarely within the discretionary function exception of § 2680(a)."

b. Even if the government could be held responsible for compliance with the regulations in question here, the district court specifically found (Pet. App. 19a), after a trial on the merits, that the use of nonconductive tubs was permitted by Section 20.4 of the *Army Safety Manual*.[4] The court of appeals agreed (Pet. App. 4A n.1).[5] Petitioners claim (Pet. 23) that that decision was a "manifest error of fact" but this Court does not sit to review the factual findings of two lower courts. *Graver Mfg.* v. *Linde Co.*, 336 U.S. 271, 275 (1949). Furthermore, expert testimony by three separate witnesses supports the conclusion that the tubs used by Hercules did comply with the regulations. See C.A. App. 554, 658-659, 750.

[4] The district court, in its supplemental opinion, did not discuss Hercules' sprinkler system, which petitioners also claimed violated the *Army Safety Manual*. The main focus of petitioners' argument, however, was on the nonconductive tubs; in their Motion for Reconsideration, petitioners only mentioned the sprinkler system in a single sentence of a footnote (see C.A. App. 339 n.1). The district court's conclusion that this issue did not warrant independent discussion is therefore understandable in light of its alternative holding that the burden for compliance with the regulations rested on the contractor, not the government. Furthermore, the testimony at trial indicated that it was not possible at the time in question to buy a faster sprinkler system (*id.* at 512-513, 698). In light of this impossibility, the Army in 1986 amended the regulation to raise the required response time (*id.* at 351-352).

[5] The court of appeals stated (Pet. App. 4A n.1), in addition, that violation of a mandatory regulation would not abrogate the government's tort immunity provided that the government was still exercising a discretionary function. That statement is no longer tenable in light of this Court's decision in *Berkovitz*, but it was clearly not essential to the court of appeals' decision. The fact that the regulation was not violated was an independent ground for affirming the district court.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

CHARLES FRIED
Solicitor General

JULY 1988

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REPLY

BRIEF

NO. 87-1929

Supreme Court, U.S.
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

MARK LYNN FORTNEY;
ESLEY DOUGLAS TIPTON
AND MARY E. TIPTON;
DANIEL WEBSTER HARMON AND
MARY JANE HARMON

Petitioners,

V.

UNITED STATES OF AMERICA

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

REPLY BRIEF IN SUPPORT OF PETITION

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The United States makes two arguments in its Memorandum in opposition to the petition. First, it contends that this case is controlled by *United States v. S.A. Empresa de Viacao Aerea Rio Grandense*, 467 U.S. 797 (1984) ("Varig"), because safety at the Radford plant was primarily the contractor's responsibility. Second, while acknowledging that violation of mandatory regulations remove a case from the discretionary function exception, the Government asserts that the regulations in question were not violated.

I. THIS CASE IS NOT GOVERNED BY VARIG.

Varig does not control this case, for here the Government acted in a different capacity: as a proprietary owner of land, rather than as a regulator of private conduct. In *Varig*, the Federal Aviation Administration regulated and tested the conduct of private manufacturers. Here, by contrast, the Government owns the Radford Army Ammunition Plant; as the owner it retains duties to act, imposed by Virginia tort law. *T.E. Ritter Corp. v. Rose*, 206 Va. 736, 107 S.E.2d 483 (1959). These are proprietary duties rather than regulatory rights.

This crucial distinction was recognized by the Eighth Circuit, after *Varig*, in *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985), a case which involved identical circumstances: the Government, as the owner of land and plant, contracting with a manufacturer for the production of military equipment, and retaining a duty under local law to effectuate safety measures. Id. at 306. Noting this "important difference," the court concluded that *Varig's* admonition against judicial scrutiny of regulatory decisions was of less force in the Government-as-proprietary owner situation.

Acknowledging that the pr sent case involves the Government's "failure to uncover" violations of its own regulations, the United States nonetheless urges that negligence in "compliance review" is shielded by *Varig*. This is precisely the position squarely rejected in *McMichael*, the Fourth Circuit's holding and *McMichael* stand in direct conflict. *McMichael* is not discussed or cited by the Government, though the conflict was raised in the Petition.

Both cases involve Government safety inspectors at Government safety regulations. The conduct cannot be discre-

tionary at military plants in the Fourth Circuit but nondiscretionary at plants in the Eighth Circuit. This Court must resolve the conflict.

II. SINCE POLICY JUDGMENT WAS NOT IMPLICATED THE RULING CANNOT STAND.

The Government concedes that after *Berkovitz v. United States*, No. 87-498 (June 13, 1988), violations of safety regulations take a case out of the discretionary function exception because a Government actor could not make policy judgment in the face of such regulations. The Government contends, however, that the Army safety regulations in question, AMCR 385-100 §20.4 and §12.33(g), were not violated.

First, it plain and undisputed that §12.33(g) was indeed violated. The regulation (reproduced at p. 5 of the Petition)[1] explicitly requires for nitrocellulose dehydration operations a fire protection system capable of delivering water in 50 milliseconds, yet it was agreed at trial that the system in use took three times as long to flow.

Second, the finding below that §20.4, which prescribes the type of container to be used, was not violated is patently wrong. That the lower courts inexplicably found nonconductive tubs to be "embraced" by a regulation which does not list nonconductive tubs as a permissible choice does not make it so, any more that the nerovirulence criteria in the regulation at issue in *Berkovitz* "embrace" test results different from those explicitly required. This Court should find that

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1. As with §20.4, the other regulation, the word "should" is mandatory by virtue of §1.3(b) (reproduced at p. 3-4 of the Petition), unless a waiver is secured. No such waiver was ever sought or obtained, and the Government does not dispute this fact.

black is black, even if the lower courts have held that black is white.[2]

More fundamental, however, is the bedrock inquiry of this case: was the decision between a nonconductive and a conductive tub a *policy* choice? Were economic, social, or political choices being made? Was this an electrical engineering decision that ought not be judicially second-guessed?

The Government argues in footnote 5 of its Memorandum that if the finding of no violation is upheld, then the exception applies. While *Berkovitz* holds that violations of regulations vitiate the exception, no court has ever held that negligence is actionable *only* if a plaintiff can point to a specific violation; the question is whether policy is being made.

The Government's suggested ground for affirmance–no violation–conflicts directly with *United States Fire Ins. Co. v. United States*, 806 F.2d 1529 (11th Cir. 1986), which involved Coast Guard negligence in maintaining wreck markers. The relevant manual of procedures listed various methods of performance. In holding that the choice of a listed method did not shield the Government from liability if that choice was negligent, the Eleventh Circuit recognized that the mere listing of an alternative is unavailing if its choice "is not required by a policy directive from above." Id. at 1537. Similarly, even if §20.4 somehow "embraces" nonconductive tubs as a choice, their selection is actionable because *policymaking* did not enter into the decision.

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2. The Government cites portions of the trial transcript, not before this Court, and argues that "expert testimony" showed that §20.4 was not violated. The Government does not reproduce the testimony, and neglects to acknowledge that the Government's main expert at trial conceded on cross-examination that the regualtion was violated. C.A. App. at 564-65.

In the closely analogous field of individual immunity, this Court recently rejected an identical argument by federal officials. *Westfall v. Erwin*, _____ U.S. _____, 98 L.Ed.2d 619 (1988) involved a suit by a civilian federal employee against Army depot officials for negligence in causing him to inhale soda ash. The officials contended that if "precise conduct is not mandated by law, then the act is 'discretionary' and the official is entitled to absolute immunity. . . ." Id. at 627. This Court, however, rejected "such a wooden interpretation of the discretionary function requirement. Because virtually all official acts involve some modicum of choice, petitioner's reading of the requirement would render it essentially meaningless." Id.

This Court recognized that such an arbitrary focus would ignore the real purpose of the immunity doctrine–whether the prospect of tort liability will detrimentally inhibit federal officials' judgment. Similarly, focusing on whether the conduct challenged in a Federal Tort Claims Act suit is covered by a mandatory regulation ignores the real issue–whether that conduct implicates policy concerns.

Berkovitz makes clear that if the challenged decision involves the "application of objective scientific standards" rather than "policy judgment," slip op at 13, the exception does not apply. Here only science was involved–not public policy. There is no principled way to call neurovirulence criteria review "discretionary," and a decision that nonconductive tubs are smarter than conductive tubs "discretionary." If a regulation was violated, policy could not have been involved. The absence, however, of a regulation does not make a garden-variety engineering choice a policy decision.

The Government has never pointed to, and the lower courts did not identify, a single social, economic, or political

consideration in the facts of this case. Nowhere in the hundreds of pages of testimony or in the Army or Hercules post-explosion investigations is any policy factor mentioned. The Government's own safety director negated any such possibility in testifying that AMCR 385-100 is "the Bible," that he has no discretion to change the regulations, that he "can't formulate [his] own policy," and that the Government safety staff at Radford surveys each operation in its entirety and may "take as much time as necessary to do a good job." (C.A. App. 575, 577-78, 598).

CONCLUSION

No policy decision has ever been identified by the Government's decision to let Building 3507 proceed with nonconductive rather than conductive tubs. Whether or not they are specifically "embraced" by regulations, the choice of one set of tubs over another is no different from the kind of official judgment held fully actionable in *Berkovitz*. Conduct identical to that herein has been held actionable by another court of appeals. The ruling below cannot coexist with *Berkovitz* and *McMichael*.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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SUPPLEMENTAL

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SUPPLEMENTAL MEMORANDUM IN SUPPORT OF PETITION

The above case is before this Court on Petition for a writ of certiorari to the Fourth Circuit. The issue is the validity of the court of appeals' holding that Petitioners' claims against the United States are barred by the discretionary function exception to the Federal Tort Claims Act, 26 U.S.C. § 2680(a).

As discussed in Petitioners' Original Petition and Reply Brief, the ruling below conflicts most strikingly with *McMichael v. United States*, 751 F.2d 303 (8th Cir. 1985) (see pp. 17-18 of Original Petition and pp. 2-3 of Reply Brief). *McMichael* involved circumstances identical to those presented in the instant case: the government safety staff's failure to enforce regulations at a military production plant run by a contractor. On appeal from the granting of a motion to dismiss, the Eighth Circuit held that the discretionary function exception did not bar suit for failure to enforce compliance with the regulations.

Upon remand, the trial on the merits was had, and the United States appealed from judgments against it. After initial briefing the court of appeals stayed resolution of the discretionary function exception issue to await this Court's decision in *Berkovitz v. United States*, _____ U.S. _____, 108 S.Ct. 1954 (1988). *Berkovitz* has been discussed by Petitioners and Respondent in the present case; the holding makes clear that tort claims involving the "application of objective scientific standards," *Id.* at 1964, are fully actionable.

The Eighth Circuit has now reevaluated the claims in *McMichael* in light of *Berkovitz*, and again found them to be outside the discretionary function exception. *McMichael v. United States*, _____ F.2d, No. 87-1634 (8th Cir., Aug. 25, 1988) (WESTLAW printout attached as Appendix). The

court again concluded that the broad initial decision to delegate primary safety responsibility to the contractor was insulated from liability. Failure to enforce compliance with regulations embodying policies previously determined, however, is actionable:

> In the case before us, as in *Berkovitz*, the initial discretion granted by the regulations to the Defense Department was broad; the inspectors, however, violated the Department's own policy directives by failing to comply with specific procedures mandated by the Defense Department. The procedures directed the inspectors to make sure that Celesco complied with numerous safety requirements at the plant. . . . Thus, although Celesco had the authority to evacuate the plant, the Department policy prescribed a course of action for the inspector to follow in the event of any electrical storm, and the inspector had no choice but to adhere to that directive. Hence, the discretionary function is not applicable.

Id. at 6.

Military inspectors checking for safety compliance are not formulating public policy. *McMichael* is indistinguishable from the present case, and the Eighth Circuit has held that claims concerning enforcement of safety regulations at military production plants are not barred by the discretionary function exception. The challenged conduct cannot be discretionary at plants at the Fourth Circuit but nondiscretionary at plants in the Eighth Circuit. This Court must resolve the conflict.

WHEREFORE, PREMISES CONSIDERED, Petitioners pray that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Fourth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed this 4th day of October, 1988, to all counsel of record.

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BRENT M. ROSENTHAL

APPENDIX

Citation | Rank (R) | Database | Mode
--- F.2d --- | R 14 OF 24 | ALLFEDS | P
1988 WL 87872 (8th Cir. (Ark.))

Carl McMICHAEL,
Administrator of the Estate of Emma McMichael, Deceased,
Appellee,

v.

UNITED STATES of America,
Appellant

Insurance Company of North America,
(Intervenor Below).

Mrs. Lamar BARTLETT;
Winfred Lowe, Administrator of the Estate of Thelma Lowe;
Mrs. Edna Rogers; Mrs. Flora Weaver; and Mrs. Georgia Ray,
Appellees,

v.

UNITED STATES of America,
Appellant,

Insurance Company of North America,
(Intervenor Below).

Leonard MADISON,
Administrator of the Estate of Lula Mae Madison, Deceased,
Appellee,

v.

UNITED STATES of America,
Appellant,

Insurance Company of North America,
(Intervenor Below).

Gertie B. MITCHELL,
Administratrix In Succession of the Estate of Eliza Walker,
Deceased,
Appellee,

v.

UNITED STATES of America,
Appellant,

Insurance Company of North America,
(Intervenor Below).

Billy Dwayne MOODY,
Administrator of the Estate of Geraldine Moody, Deceased,
Appellee,

v.

UNITED STATES of America,
Appellant,

Insurance Company of North America,
(Intervenor Below).

Willie D. KELLY,
Administrator of the Estate of Shirley J. Kelly, Deceased,
Appellee,

v.

UNITED STATES of America,
Appellant,

Insurance Company of North America,
(Intervenor Below).

Billy HARRISON,
Administrator of the Estate of Elsie Marie Harrison,
Deceased,
Appellee,

v.

UNITED STATES of America,
Appellant.

James STANCILE, Administrator of the Estate of
Lula Mae Madison, Deceased,
Appellant,

Gertie B. Mitchell,
Administratrix In Succession of the Estate of Eliza Walker,
Deceased,
Appellant,

Willia H. Moody,
Administrator of the Estate of Geraldine Moody, Deceased,
Appellant,

Willie D. Keliy,
Administrator of the Estate of Shirley J. Kelly, Deceased,
Appellant,

v.

UNITED STATES of America,
Appellee,

Highland Resources, Inc.,
Appellee.

Nos. 87-1634 to 87-1640, 87-1707.

COPR. (C) WEST 1988 NO CLAIM TO ORIG.
U.S. GOVT. WORKS

United States Court of Appeals,
Eighth Circuit.
Submitted Jan. 11, 1988.
Decided Aug. 25, 1988.

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and MAGILL, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

The United States Department of Defense contracted with Celesco Industries, Inc., an independent contractor, to produce explosive photo-flash cartridges. On March 8, 1976, an explosion occurred at the Celesco plant in East Camden, Arkansas, killing seven employees, seriously injuring five, and causing minor injuries to numerous others. Consolidated cases were filed against the United States under the Federal Tort Claims Act (FTCA), 28 U.S.C.A. ss 1346, 2671-2680 (1982) and Highland Resources, Inc. under state law, the owner and lessor of the building where the explosion occurred. The government appeals from the district court's [FN1] award of damages to the injured or killed employees, arguing that the court erred in ruling that the claims were not barred by the discretionary function exception to the FTCA and in holding that the government was negligent in failing to enforce safety standards at the plant. The employees cross-appeal, contending that the district court erred in ruling that Highland Resources was not liable under Arkansas products or strict liability statutes, or common law principles of negligence. For the reasons set forth below, we affirm.

This case is before us for the third time. The factual background is outlined in our first opinion, Madison v. United States, 679 F.2d 736, 737-38 (8th Cir. 1982), and the procedural and appellate history is set forth in our second opinion, McMichael v. United States, 751 F.2d 303, 304-05

(8th Cir. 1985). [FN2] After a bench trial in January 1986 the district court made factual findings, which we recite below.

On June 20, 1975, the United States awarded Celesco a contract to produce highly explosive photo-flash cartridges. Before submitting the bid, the government required Celesco to secure a manufacturing facility. Celesco leased a former naval ammunition plant in East Camden, Arkansas from Highland Resources, a commercial lessor. Celesco, an experienced munitions manufacturer, had leased other buildings for similar purposes and had special knowledge of the construction requirements for buildings to be used in the production of munitions. Highland, on the other hand, did not possess such special knowledge.

Before awarding the contract to Celesco, the Defense Department required the Safety Manager of the Defense Contract Administrative Services Region (DSCAR) to review Celesco's safety procedures, processes, facility and personnel to determine whether Celesco could comply with the Department of Defense safety requirements. The survey concluded that Celesco and the facility complied with the department guidelines. It developed at trial, however, that the Safety Manager did not conduct an on-site evaluation of the plant at the time of the survey.

The contract between Celesco and the government required Celesco to promulgate safety provisions and comply with safety standards established by the Department of Defense Contractor's Safety Manual for Ammunition, Explosives and Related Dangerous Materials (DOD Manual) and the provisions of the Armed Services Procurement Regulations. See 32 C.F.R. s 7.104-79 (1984). These requirements and standards were incorporated into the contract. The contract delegated primary responsibility for safety to

Celesco, and Celesco hired a full-time safety staff, headed by a safety engineer. Pursuant to the contract terms, the government provided Celesco with three on-site quality assurance representatives, or inspectors. One inspector was placed in Building M-35, the building where the explosion occurred, on a full-time basis. Although the primary responsibility of the inspector was to oversee Celesco's compliance with the quality requirements of the contract, safety review was also an integral part of his assigned tasks. The inspectors' regular procedures included a fifty-one step procedures review checklist for safety compliance. The Armed Services Procurement Regulations and the Celesco contract gave the inspectors the authority to require on-the-spot corrective action, and the contracting officer was authorized to cease production by withdrawing government inspectors until the safety violations were corrected. [FN3]

The district court found a number of conditions at the Celesco plant did not comply with the safety requirements of the contract. For example, the lightning protection system was inadequate and there was no humidity control in Bay 4 of Building M-35, where the explosion occurred. Water was present in an area where detonation was likely to occur. (Moisture, in the form of water or humidity, is an initiating force for the photo-flash). Despite a sign directing that the steel blast doors to Bay 4 remain shut at all times, the doors were constantly left open. The open doors allowed the blast to spread down a hallway, where all but one of the killed or injured employees were at the time of the explosion. In addition, although there was conflicting testimony concerning the precise amount of the photo-flash in Bay 4, by any account the amount exceeded the limit approved by the government. [FN4] Shortly before the explosion, the Building M-35 government inspector informed Celesco's line supervisor that Bay 4 was overloaded. There was also testimony that defective loaded components, or "rejects," were

stored in Bay 4, contrary to the safety requirements of the contract. Finally, the Department of Defense manual required evacuation of personnel in the event of an electrical storm, and the district court found that although on the morning of March 8, 1976, there was rain, thunder and lightning in the East Camden area, no evacuation of the plant was ordered. An explosion occurred in Building M-35, killing and injuring numerous employees.

The district court found that the government was negligent in failing to enforce the safety standards incorporated in its contract with Celesco. Specifically, the court ruled that the government inspectors were negligent in failing to order an evacuation until the storm passed and that this was the proximate cause of the employees' injuries. The court also concluded that the lessor of the Celesco Plant, Highland Resources, Inc. was not liable on any of the theories advanced by the employees and dismissed the counts against them.

I.

The government first argues that the action is barred by the discretionary function exception* to the FTCA, 28 U.S.C. 2680(a) (1982), and that the district court erred in refusing to consider whether the exception applied. For purposes of the government's motion for summary judgment, the parties entered into a stipulation of fact, which was before, and substantially relied upon by, this court in our earlier decisions. See McMichael, 751 F.2d at 305; Madison, 679 F.2d at 738 n. 3. The essence of the stipulation was that the contract imposed numerous mandatory safety standards on Celesco, but that the government, despite its "three onsite assurance inspectors," failed to enforce Celesco's compliance with those standards and thereby caused plantiffs' injuries. [FN5] The government expressly reserved the right to

contest all assertions set forth in the stipulation at trial. [FN6] After this court affirmed the district court's ruling that the discretionary function exception did not bar the employees' claim and remanded the case for trial, McMichael, 751 F.2d at 310, the government moved to vacate the stipulation, alleging that the stipulation was "fragmented" and "flawed." Although the district court vacated the stipulation, the court ruled that it was bound by this court's rulings in Madison and McMichael that the discretionary function exception did not apply. In view of the facts developed at trial, the government contends that the discretionary function exception applies and accordingly the district court was without subject matter jurisdiction. See K.W. Thompson Tool Co., Inc. v. United States, 836 F.2d 721, 726 n. 3 (1st Cir. 1988). It is true that the district court did not reconsider whether the discretionary function applied. However, the court did make extensive findings of fact which bear upon this issue and in any event, we review de novo the application of the discretionary function exception. See Berkovitz v. United States, 108 S.Ct. 1954 (1988); McMichael, 751 F.2d at 303; see also Starret v. United States, 847 F.2d 539, 541 (9th Cir. 1988) ("we review de novo a district court's determination that it lacks subject matter jurisdiction under the discretionary function exception"). Thus, the issue before us is whether the United States is exempt from FTCA liability because the acts of negligence found by the district court represent the exercise or performance of discretionary functions under section 2680(a).

A.

The FTCA authorizes suits for damages against the United States for "injury or loss of property, or personal injury or death caused by the negligent or wrongful act or omission of any employee of the government while acting within the scope of his office or employment, under circumstances

where the United States, if a private person, would be liable to the claimant in accordance with the law of the place where the act or omission occurred." 28 U.S.C. s 1346(b). In such suits, the United States is liable in the same manner and to the same extent as a private individual under like circumstances. 28 U.S.C. s 2674. Suit is not allowed, however, for "[a]ny claim * * * based upon the exercise or performance or the failure to exercise or perform a discretionary function or duty on the part of a federal agency or an employee of the Government, whether or not the discretion involved be abused." 28 U.S.C. s 2680(a).

After both the trial in this case, and briefing and oral arguments on appeal, the United States Supreme Court issued its decision in Berkovitz v. United States, 108 S.Ct. 1954 (1988), clarifying the scope of the FTCA discretionary function exception.

The Court reiterated that "it is the nature of the conduct, rather than the status of the actor, that governs whether the discretionary function exception applies." Berkovitz, 108 S.Ct. at 1958 (citing Varig Airlines, 467 U.S. at 813). In examining the nature of the challenged conduct, we are instructed to first consider whether the action is a matter of choice for the acting employee; conduct cannot be discretionary unless it involves an element of judgment or choice. See Dalehite v. United States, 346 U.S. 15, 34 (1953). Thus, the exception is not applicable when a federal statute, regulation, or policy specifically prescribes a course of action for an employee to follow. Berkovitz, 108 S.Ct. at 1958-59.

If the challenged conduct does, however, involve an element of judgment, we must then determine whether that judgment is of the kind that the discretionary function exception was designed to shield. As stated in Varig Airlines, the basis for the exception was Congress' desire to "prevent

judicial 'second-guessing' of legislative and administrative decisions grounded in social, economic, and political policy through the medium of an action in tort." 467 U.S. at 814. Thus, the exception protects only governmental actions and decisions based on considerations of public policy. Berkovitz, 108 S.Ct. 1959 (citing Dalehite, 346 U.S. at 36).

The Court examined Berkovitz's allegation that the Bureau of Biologics of the Food and Drug Administration (FDA) wrongfully approved release to the public a contaminated polio vaccine lot, looking first to the regulatory framework governing release of vaccine lots. The regulations required the vaccine manufacturers, not the FDA, to examine all lots before distribution to ensure compliance with regulatory standards. The regulations empowered, but did not require, the FDA to examine and prevent the distribution of non-complying losts. The Court concluded that the regulatory scheme was substantially similar to the scheme in Varig Airlines, because the regulations allowed the Bureau to determine the appropriate way to regulate the release of vaccine lots, rather than mandating certain kinds of agency action. Berkovitz 108 S.Ct. at 1963-64. See Varig Airlines, 467 U.S. at 804-07. In this regulatory context, the Court held that the discretionary function exception barred any claim challenging the Bureau's formulation of policy as to the appropriate way in which to regulate the release of vaccine lots, and any claim challenging the officials in exercising any discretion the policy itself allowed for. Berkovitz, 108 S.Ct. at 1964. The Court based these rulings on Varig Airlines, in which it had earlier held that the Federal Aviation Administration's decision to review aircraft design and manufacture for compliance with FAA safety regulations through a certification process—involving a spotcheck of the manufacturer's work—was a discretionary, function; and that the FAA employees' execution of the spot-check program was discretionary. 467 U.S. at 819-20.

The Court further held that the exception did not apply to the Bureau's acts implementing that policy which did not involve the permissible exercise of policy discretion. Berkovitz, 108 S.Ct. at 1964. The latter type of claim was precisely the claim asserted by Berkovitz. Berkovitz alleged that under the authority of the regulations, the Bureau adopted a policy of testing all lots for compliance with safety standards and preventing distribution to the public of any noncomplying lots, and that notwithstanding this policy, the employees knowingly approved release of a noncomplying lot. The Court ruled that this claim was directed at governmental action that involved no policy discretion, and thus the exception could not apply. [FN7] Id.

Berkovitz controls our decision in this case. Certainly, the Defense Department's decision to entrust Celesco with the primary responsibility of ensuring that it complied with safety regulations and supervising plant safety involved the permissible exercise of policy judgment and is protected by the discretionary function exception. Cf. Berkovitz, 108 S.Ct. at 1964 (discretionary function exception barred any claim challenging the Bureau's formulation of policy as to the appropriate way in which to regulate the release of vaccine lots); Varig Airlines, 467 U.S. at 819-20 (same with respect to the FAA's formulation of policy about how to regulate airplane safety). So, too, are any of the policy judgments made by officials in implementing the Defense Department's policies and programs. Berkovitz, 108 S.Ct. at 1964; Varig Airlines, 467 U.S. at 820.

However, as discussed, the discretionary function exception does not apply to acts which do not involve the permissible exercise of discretion. Berkovitz, 108 S.Ct. at 1964. In the case before us, as in Berkovitz, the initial discretion granted by the regulations to the Defense Department

was broad; the inspectors, however, violated the Department's own policy directives by failing to comply with specific procedures mandated by the Defense Department. The procedures directed the inspectors to make sure that Celesco complied with numerous safety requirements at the plant. In particular, Item 16 of the inspector's 51-part checklist states: "Verify that the contractor complies with electrical storm procedure. Note: In the event of an electrical storm, DCAS personnel are to evacuate area of explosives in buildings. Notify QAR if this should occur." The checklist further directed the inspectors to check Celesco's compliance with this directive if an electrical storm occurred.

Thus, although Celesco had the primary responsibility for safety and the authority to evacuate the plant, the Department policy prescribed a course of action for the inspector to follow in the event of any electrical storm, and the inspector had no choice but to adhere to that directive. Hence, the discretionary function is not applicable. Berkovitz, 108 S.Ct. at 1964; Aslakson v. United States, 790 F.2d 688, 692-94 (8th Cir. 1986) (claim that agency officials failed to comply with their own safety policy is not barred by the discretionary function exception); Mandel v. United States, 793 F.2d 964, 967 (8th Cir. 1986) (claim that National Park Service's failure to warn of hazardous conditions in a park was not covered by discretionary function exception, because the park violated its own previously adopted safety policy); Collins v. United States, 783 F.2d 1225, 1228-31 (5th Cir. 1986) (claim that Mine Safety and Health Administration failed to close mine, when challenged decisions did not involve "policy" decisions, or any explicit mandatory duties is not barred by discretionary function exception). Cf. Allen v. United States, 816 F.2d 1417, 1421 (10th Cir. 1987), cert. denied, 108 S.Ct. 694 (1988) (no evidence that test site personnel ignored or failed to implement specific procedures mandated by agency guidelines).

While it is true that the government introduced some evidence for the purpose of tending to show that there was some exercise of discretion in the manner in which it performed its safety inspections, the evidence we have set forth above, in our judgment, goes directly to the nature of the challenged conduct that is the critical issue in this case, namely, the failure to evacuate the plant because of the approaching thunderstorm. Here, the government inspectors had no discretion. Evacuating the plant was mandated. [FN8] The district court did not err in refusing to dismiss the employees claim under the discretionary function exception.

B.

The government further maintains that even if the discretionary function exception does not apply, under Arkansas law the government had no actionable duty under the circumstances of this case and therefore the district court erred in holding the government liable. See 28 U.S.C. s 1346(b).

In McMichael, after examining in detail the relevant Arkansas law, 751 F.2d at 308-10, we affirmed the district court's ruling that under Arkansas law, an employer of an independent contractor has a duty to use due care to prevent the contractor from conducting inherently dangerous or ultrahazardous activities without proper precautions. We held that this conclusion was supported by several principles of Arkansas law, including: 1) Arkansas cases which hold that one who hires an independent contractor is liable for his own negligence, especially when he performs activities in relation to the work negligently; 2) the Restatement (Second) of Torts s 414 (1965), which provides that an employer of an independent contrator who exercises control over any part of the contractor's work is subject to liability to those

injured as a result of the employer's failure to exercise the control with reasonable care; and 3) other FTCA cases which hold that one who hires an independent contractor to do extra-dangerous work or ultrahazardous work has a duty to exercise reasonable care to see that the contractor takes proper precautions to protect those who might sustain injury from the work. McMichael, 751 F.2d at 308-10.

On appeal, the government once again argues that Arkansas law recognizes no duty under which the government may be held liable. Pointing to the DOD Safety Manual and regulations, the government maintains that its inspectors had no authority, duty or control over the evacuation of the Celesco plant. The government argues that this was the exclusive responsibility of Celesco, and therefore, the government cannot be held liable for the negligence of its independent contractor. [FN9] See Jackson v. Petit Jean Electric Co-op, 268 Ark. 1076, 599 S.W.2d 402, reh' g denied, 270 Ark. 506, 606 S.W.2d 66, 69 (1980).

The district court found, however, that the government retained a substantial degree of control over Celesco. This finding is fully supported by the record. The government incorporated its safety regulations into the Celesco contract. These regulations required Celesco to evacuate the plant during an electrical storm. The government placed on-site inspectors at the plant and the inspectors had the authority and the duty to ensure that Celesco complied with the safety regulations of the contract. The inspectors were required to ensure that Celesco evacuated the plant during an electrical storm and were directed to contact the contracting officer who could order the inspector from the plant, which according to the contract, would close the plant. Accordingly, we cannot say the court erred in concluding that the government retained a sufficient degree of control over Celesco to render the government liable under Arkansas law.

II.

The government next contends that the district court erred in allowing three of the plaintiffs to increase their damage claims above the amount of their administrative claims. [FN10]

A.

As a jurisdictional prerequisite to a suit under the FTCA, an administrative claim must first be filed. 28 U.S.C. s 2675(a). Judicial action under the FTCA cannot be instituted for a sum in excess of the claim presented to the federal agency, unless the increased amount is based upon newly discovered evidence not reasonably discoverable at the time the administrative claim was presented, or upon allegation and proof of intervening facts relating to the amount of the claim. 28 U.S.C. s 2675(b). The district court permitted three of the employees to amend their complaints on the ground that under the circumstances of this case, inflation qualified as an "intervening fact."

The district court evaluated the differing affidavits of several experts and found that it was unforeseeable not only that inflation would occur, but also that this matter would remain in litigation over a decade. The court further noted that the government had taken full advantage of virtually every procedural barrier to concluding the matter and that to deny the employees' motion to amend the ad damnum clause would result in substantial injustice, contrary to the purposes of the FTCA. Thus, the court permitted the employees to increase their claims, concluding that inflation qualified as an "intervening fact" relating to the amount of the claim under 28 U.S.C. s 2675(b).

The government argues that inflation is a "permanent fixture" in the economy, see Jones & Laughlin Steel Corp.

v. Pfeifer, 462 U.S. 523, 538 (1983), and therefore cannot qualify as an unexpected or unforeseen event as required by s 2675(b). See Martinez v. United States, 780 F.2d 525, 528-30 (5th Cir. 1980); O'Rourke v. Eastern Air Lines, Inc., 730 F.2d 842, 855-56 (2d Cir. 1984). The government further argues that even if inflation qualifies as an "intervening fact," the employees failed to show that it warranted the almost twofold increases allowed here.

The district court's finding that the inflation which occurred between 1976 and 1986 was unforeseen is fully supported by the record. Affidavits of two experts were submitted stating that the value of the dollar declined about 50% from 1976 to 1986 and that this decline was unforeseeable. Cf. O'Rourke, 730 F.2d at 856. Further, at the time the plaintiffs filed their administrative claims, it was certainly unforeseeable that the claims would remain unresolved for over ten years. The government, pointing to their expert's affidavit, argues that the average rate of inflation between 1976 and 1986 was 6.84%, only 1% above the rate of the preceding ten-year period, and therefore cannot be considered unforeseeable. Further, the government maintains that the 6.84% rate of inflation which did occur cannot justify allowing the employees to almost double the amount of their administrative claims. The government, however, fails to consider that the employees had no way of knowing how long the matter would be in litigation when they filed their administrative claims. Moreover, by citing to the average rate of inflation, the government does not consider inflation's spiraling effects. Thus, we conclude that in the unique circumstances of this case, the district court did not err in permitting the employees to amend their complaints.

B.

The government also argues that by allowing damages above the amounts of the administrative claims, the district

court. although labeling the award "inflation," actually allowed recovery for prejudgment interest. See Preston v. United States, 776 F.2d 754, 760 (7th Cir. 1985). The FTCA bars an award of prejudgment interest. 28 U.S.C. s 2674(b). The government relies on the employees' expert economist affidavit which states: "[if prejudgment interest was allowable, (at the legal rate of 10%) there would be 90% accrued * * * to date, to almost double the original amount." Since the increases allowed were almost double the amount of the administrative claims, the government infers that the increases were actually an award of prejudgment interest.

We are satisfied that the district court did not allow a recovery for prejudgment interest. As discussed in Part IIA, supra, there is substantial evidence in the record that inflation occurring between 1976 and 1986 caused the value of the dollar to decline about 50%. The fact that roughly the same amount of interest would have accrued does not mean that the court awarded damages for prejudgment interest. Decline in the value of the dollar is not equivalent to an award of prejudgment interest. Cf. Preston, 776 F.2d at 760. The district court did not err in permitting the employees to amend their complaints.

III.

The employees cross-appeal, arguing that the district court erred in dismissing f—heir claims against Highland Resources. Specifically, the employees argue that the district court erred in ruling that Arkansas products and strict liability statutes did not apply to the lease of Building M-35; that Highland did not breach an implied warranty of fitness; and that punitive damages cannot be assessed against Highland.

A.

The district court held that neither the Arkansas Products Liability Act, Ark. Code Ann. ss 16-116-101-107 (1987)

(previously Ark. Stat. Ann. s 34-2801-34-2802 (Supp. 1985)), nor the Arkansas strict liability statute, Ark. Code Ann. ss 4-86-102 (Previously Ark. Stat. Ann. ss 85. -2-318. 1-318.2 (Supp. 1985)) applied because the lease of Building M-35 does not qualify as a "product" within the meaning of the Arkansas statutes.

We accord great weight or deference to a federal district court's interpretation of state law. Kansas State Bank v. Citizens Bank, 737 F.2d 1490, 1496 (8th Cir. 1984); Pyle v. Dow Chemical Co., 728 F.2d 1129, 1130 (8th Cir. 1984). The employees have not cited nor are we aware of any Arkansas cases which have applied product or strict liability statutes to the commercial leasing of an industrial building. Cf. Blagg v. Hunt Co. Inc., 272 Ark. 185, 612 S.W.2d 321 (1981) (builder-vendor of a house considered the supplier of a product and therefore strictly liable for defective carpet in the house). Accordingly, we cannot say that the district court erred in dismissing the employees' claims under the Arkansas strict and product liability statutes.

B.

Next, the employees claim that the district court erred in ruling that Highland did not breach its implied warranty of fitness in the Building M-35 lease. The court held that an "implied warranty is limited to latent defects which are not discoverable by subsequent purchasers upon reasonable inspection and which became manifest only after purchase." Blagg, 612 S.W.2d at 322. The court ruled that such a warranty was not breached because any building defects (in particular, the lightning protection system) were discoverable upon reasonable inspection. We cannot conclude this finding is clearly erroneous. Both Celesco and the government had the opportunity to inspect and review Building M-35 before execution of the lease. It is undisputed that the government

did not inspect the building, although the pre-award survey indicated otherwise. Moreover, it is not contended that the inadequacies in the lightning protection system were not discoverable upon reasonable inspection. Finally, Celesco, not Highland, had the responsibility of ensuring that the building complied with the contract requirements. As the district court noted, had Highland received notice of any building defects, Highland may have had a duty to take corrective action, but here, neither Celesco nor the government ever notified Highland of any defects. These findings are supported by the record and, accordingly, we cannot conclude that the district court erred in ruling that Highland did not breach any implied warranties of fitness contained in the lease.

C.

The employees also argue that the district court erred in ruling that Highland was not negligent in leasing Building M-35 to Celesco. Specifically, the government points to the testimony that Building M-35 was suitable to manufacture only Class 2 explosives, not Class 7 (which includes photoflash cartridges), and that the building was not constructed so that the outside wall and roof would "blow out" upon explosion. Based on this testimony, the employees maintain that the building was dangerously defective at the time it was leased and that Highland negligently leased the building to Celesco. The district court ruled, however, that Highland did not breach any duty owed to Celesco, reasoning that although Highland represented that the building was generally suitable for a munition manufacturer, "Highland was not charged with a duty to review [Celesco's] bid solicitation to determine whether Celesco was to produce Class 7 or any other Class of explosives." Moreover, although the court made no specific finding whether the building was constructed in accordance with the recommended "shotgun

theory," the court reasoned that this was of little consequence because Celesco's failure to keep the doors shut would have nullified any benefits of this type of construction. The court concluded that the building was not defective at the time the lease was executed. We have carefully reviewed the record and cannot conclude this finding is clearly erroneous. The district court did not err in ruling that Highland was not negligent in leasing Building M-35 to Celesco. Finding no basis for liability against Highland Resources, we reject the employees' argument that punitive damages should be assessed against Highland.

The district court is affirmed.

FN1. The Honorable Oren Harris, Senior United States District Judge for the Western District of Arkansas.

FN2. In Madison, we held that the district court erred in granting summary judgment against plaintiffs' claim that the government failed to enforce Celesco's compliance with safety regulations. We held that this claim was not protected by the discretionary function exception, 679 F.2d at 739-41, and we remanded the case for a determination of whether the plaintiffs' theory of recovery was cognizable under Arkansas law. On remand, the district court denied the government's motion to dismiss, ruling that Arkansas law permitted recovery. The government filed an interlocutory appeal, and we affirmed our earlier ruling regarding the discretionary function exception after consideration of the Supreme Court's decision in United States v. S.A. Empresa de Vicao

Aerea Rio Grandense (Varig Airlines), 467 U.S. 797 (1984). McMichael, 751 F.2d at 310. The case was again remanded to the district court for a trial on the issue of liability. Id.

FN3. Armed Services Procurement Regulation s 7-104.79 provides that a safety clause be inserted in every contract for ammunition and explosives which includes the following provision:

(b) The contractor shall comply with the DOD Contractor's Safety Manual for Ammunition, Explosives and Related Dangerous Materials (DOD Manual 4145.26M), in effect on the date of the solicitation for this contract, as it relates to ammunition and explosives, and any other additional or more stringent requirements included in the schedule of this contract. If the Contracting Officer notifies the Contractor of any noncompliance with such Manual, or schedule provisions, the Contractor shall immediately take corrective action within the time specified by the Contracting Officer, the Contracting Officer may direct the Contractor to cease performance on all or part of this contract, or until satisfactory corrective action has been taken. Any notification or direction under this paragraph should be in writing or confirmed in writing by the Contracting Officer. The Contracting Officer may at any time remove Government personnel whenever the Contractor is in noncompliance with the safety requirements of this clause. * * *
32 C.F.R. s 7.104.79 (1984).

FN4. The testimony concerning the amount of photo-flash at the time of the explosion ranged from 1400 to 2500 pounds. Bay 4 was originally limited to 400 pounds. Celesco raised the limits to 1700 pounds unilaterally, but with the knowledge of the government inspectors.

FN5. The stipulation provided:

That at the time of the injuries in question, Celesco, Inc., was operating the munitions plant in question under contract with the Department of Defense. Its relationship with the Department of Defense was that of an independent contractor. The product being produced was a photo-flash cartridge which is potentially explosive. The activity was one which would generally be recognized as being inherently dangerous or ultrahazardous. Because of the volatile nature of the product, special skill and special facilities are required to manufacture the cartridges in an acceptable and safe manner. Additionally, there are generally recognized procedures and precautions which should be utilized in the manufacturing process. It is further stipulated that Celesco did not have the requisite skills; that the facilities in question were inadequate; and that the generally recognized procedures were not followed; that government was aware, or could have learned of the various inadequacies mentioned above through its pre-award survey, its three on-sight assurance inspectors who were present throughout the operation, and through periodic spot-check

inspections. Lastly, it is stipulated that the contract with Celesco contained numerous safety regulations and requirements which the contract required Celesco to comply with; that the requirements were inadequate in some respects, and that they were not enforced by the Department of Defense. The question of proximate cause between any failure above-mentioned and the injuries is assumed to be satisfied.

FN6. We express some frustration with the government's position in this case. The government by entering into stipulations essentially obtained advisory opinions in Madison, 679 F.2d at 736, and McMichael, 751 F.2d at 303. When the result was not to its liking, it moved to vacate the stipulation arguing that it was fragmented, flawed, grossly incomplete, and erroneous. We consider this an unwarranted misuse of our limited judicial resources. The parties have not suggested that we should consider sanctions.

FN7. The Court also held that the discretionary function exception did not bar a claim that the government wrongfully licensed the drug manufacturer who produced the polio vaccine which caused Berkovitz's injuries. Berkovitz alleged that the National Institute of Health's Division of Biologic Standards (DBS) issued a license without receiving test data required by statutory and regulatory provisions. The Court reasoned that under such circumstances, the DBS had

no discretion to issue a license and therefore the claim was not barred by the discretionary function exception. The Court also held that the claim that the DBS licensed the vaccine despite its failure to comply with regulatory safety standards, may or may not be barred by the exception, depending upon whether, upon remand, the claim is interpreted to mean that DBS issued a license without determining compliance with relevant standards or after determining the vaccine failed to comply, or whether the claim is interpreted to mean that DBS made an incorrect compliance determination through the permissible exercise of policy choice. 108 S.Ct. at 1960-63.

FN8. The government also argues that the decision to cease performance of the contract is a discretionary decision protected by the exception. The government maintains that when a safety violation is detected, the inspector had a choice of ordering a variety of corrective actions, and the inspector therefore must weigh policy considerations to determine the appropriate action. Here, however, the inspector was explicitly directed in the event of an electrical storm to ensure that the contractor evacuated the plant. Thus, the particular violation at issue here did not involve the weighing of any facts or policies and was therefore not discretionary. Berkovitz, 108 S.Ct. at 1964; cf. also **Boyle** v. **United Technologies** Corp., 56 U.S.L.W. 4792, 4795 (June 27, 1988) (selection of appropriate design for military equipment

involves balancing of technical, military and social considerations and is a discretionary function); Prelvitz v. Milsop, 831 F.2d 806, 810 (8th Cir. 1987).

FN9. The United States did not relieve itself from liability to the employees by incorporating this exculpatory clause into its contract with Celesco:

Neither the requirements of this clause nor any act or failure to act by the Government in surveillance or enforcement thereof shall affect or relieve the Contractor of responsibility for the safety of his personnel and his property and for the safety of the general public in connection with the performance of this contract, or impose or add to any liability of the Government for such safety. The Contractor is not entitled to rely on the requirements of this clause or on any Government surveillance or enforcement thereof, or lack thereof, or granting of any waiver of exemption in accordance with DOD 4145.26M in discharging the Contractor's responsibility.

32 C.F.R., s 7-104.79(d) (1984), incorporated in the contract by reference. It was the Celesco employees to whom the United States owed a duty, and the government did not relieve itself of that duty through Celesco's limitation of its employees' rights. See Toole v. United States, 588 F.2d 403, 407 n.5 (3d Cir. 1978).

FN10. The government appeal on this issue is limited only to plaintiffs Moody, Kelly and Madison, who were granted leave to increase their damage claims above their administrative claims on the basis of inflation. Moody's claim was increased from $433,495.37 to 863,495.37; Kelly's claim was increased from $652,774.80 to $1,302,-774.80; and Madison's claim was increased from $206,505 to $411,505. Before trial on the issue of damages, the government entered into a stipulation of damages with plaintiffs Bartlett, Rogers, Weaver, Ray, McMichael, and Harrison. The district court awarded damages to plaintiff Walker below the amount of her administrative claim. The government does not appeal the district court's award of damages to plaintiff Lowe in excess of her administrative claim, conceding that the amendment was based on newly discovered evidence regarding the extent of Lowe's injuries.

C.A.8 (Ark.), 1988.

Carl McMICHAEL, Administrator of the Estate of Emma McMichael, Deceased, Appellee, v. UNITED STATES of America, Appellant Insurance Company of North America, (Intervenor Below). Mrs. Lamar BARTLETT; Winfred Lowe, Administrator of the Estate of Thelma Lowe; Mrs. Edna Rogers; Mrs. Flora Weaver; and Mrs. Georgia Ray, Appellees, v. UNITED STATES of America, Appellant, v. v. v. v. v. v. v. - - - F.2d - - - -, 1988 WL 87872 (8th Cir. (Ark.))
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OPINION

SUPREME COURT OF THE UNITED STATES

MARK LYNN FORTNEY ET AL. *v.* UNITED STATES

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 87-1929. Decided October 11, 1988

The petition for a writ of certiorari is granted. The judgment is vacated and the case is remanded to the United States Court of Appeals for the Fourth Circuit for further consideration in light of *Berkovitz* v. *United States*, 486 U. S. —— (1988).

JUSTICE SCALIA, with whom THE CHIEF JUSTICE, JUSTICE O'CONNOR, and JUSTICE KENNEDY join, dissenting.

Petitioners in this case were injured by an explosion at an Army munitions plant. They sued the United States under the Federal Tort Claims Act, 28 U. S. C. § 2671 *et seq.*, alleging, *inter alia*, that the explosion was caused by the Army's failure to observe a provision in its safety manual, AMCR 385-100 § 20.4 (§ 20.4), Pet. for Cert. 4, proscribing the use of certain types of containers for storage of hazardous materials. After a bench trial, the District Court entered judgment for the Government, 659 F. Supp. 127 (WD Va. 1987); the Court of Appeals affirmed in a brief *per curiam* opinion. The Court grants the petition for certiorari, vacates the judgment, and remands the case for further consideration in light of our decision last Term in *Berkovitz* v. *United States*, 486 U. S. —— (1988).

In *Berkovitz*, we held that an agency's violation of "a specific mandatory directive"—as opposed to the permissible exercise of policy discretion—is not sheltered within the discretionary function exception to the Federal Tort Claims Act waiver of sovereign immunity, 28 U. S. C. § 2680(a). *Berkovitz*, 486 U. S., at —— (slip op. 13). The apparent purpose of today's remand is to allow the Fourth Circuit to

determine whether § 20.4 is indeed a "specific mandatory directive." In the circumstances of this case, however, that determination cannot make any difference. To be sure, both the District Court and the Fourth Circuit held—erroneously, as *Berkovitz* later established—that the discretionary function exception encompassed violations of mandatory Government regulations. See App. to Pet. for Cert. 18A–19A (District Court); *id.*, at 4A, n. 1 (Court of Appeals). But the District Court also found as an alternative ground, after hearing the testimony of three expert witnesses, that the Army's use of "nonconductive" containers at the plant did not violate § 20.4 at all. *Id.*, at 19A. The Fourth Circuit explicitly affirmed this finding *after* petitioners requested a clarification of the District Court's decision on the issue. *Id.*, at 4A, n. 1. Quite obviously, a *Berkovitz* inquiry into the mandatory or discretionary nature of a provision that has in any event not been violated is fruitless.

Petitioners argue in their reply that a different provision of the safety manual, AMCR 385–100 § 12.33(g) (§ 12.33), which requires use of a sprinkler system with particular characteristics, was also violated. It is not clear from the papers before us that this contention, which was addressed in neither the District Court's opinion nor the Fourth Circuit's opinion, and which is not reflected by any mention of § 12.33 in petitioner's Memorandum of Clarification Concerning Waivers of Army Safety Regulations filed with the Fourth Circuit, see App. to Pet. for Cert. 24A–26A, was even preserved on appeal. Assuming, however, that it was preserved, it was not properly presented in the petition for certiorari. The petition states that violation of § 12.33 was part of petitioner's "theory below," Pet. for Cert. 12, and reproduces the text of § 12.33 in the preliminary section entitled "Statutes and Regulations Involved," *id.*, at 5. In the body of the petition, however, addressed to the "Reasons for Granting the Writ," not a single mention of § 12.33 is to be found, and a section entitled "The Mandatory Regulation At

Issue Herein" discusses *only* § 20.4. See *id.*, at 23–24. If this was not an explicit acknowledgment that the § 12.33 claim had subsequently been abandoned, it was at least a plain failure to present that claim to this Court. If the Court's remand rests upon § 12.33 rather than § 20.4, I think it a mischievous departure from This Court's Rule that only issues presented in the petition will be considered, Rule 21.1(a), and our requirement that the issues be presented clearly, *Berkemer* v. *McCarty*, 468 U. S. 420, 443, n. 38 (1984).

I would deny the petition for certiorari.